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Supreme Court of the United States

OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36, PETITIONERS,

vs.

J. S. GARMON, J. M. GARMON AND W. A. GARMON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED MARCH 8, 1957
CERTIORARI GRANTED MAY 6, 1957

SUPREME COURT OF THE UNITED STATES

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J. S. GARMON, J. M. GARMON AND W. A. GARMON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

J. S. GARMON, J. M. GARMON and W. A. GARMON, Plaintiffs,

vs.

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL #2020, BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL #36, JOHN DOES I TO X INCLUSIVE, Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES—
Filed May 7, 1953

Plaintiffs complain of defendants and for cause of action allege:

I

The plaintiffs are co-partners engaged in the lumber business in San Diego County under the name of Valley Lumber Company and have duly published and filed a notice that they are engaged in such business under the said name.

II

Defendant San Diego Building Trades Council is an association of labor organizations affiliated with the American Federation of Labor. Defendant Millmen's Union, Local #2020 is a labor organization affiliated with the American Federation of Labor and a member of the defendant San Diego Building Trades Council. Defendant Building [fol. 2] Material and Dump Truck Drivers Local #36 is a labor organization affiliated with the American Federation of Labor and a member of the defendant San Diego Building Trades Council.

III

Plaintiffs are ignorant of the true names of the defendants sued herein as John Does I to X, and for that reason sue the said defendants under said fictitious names; when plaintiffs learn the true names of said defendants, they will amend to substitute the said true names for the said fictitious names.

IV.

Plaintiffs are engaged in the business of selling lumber and other building materials in the City of Escondido and elsewhere in the County of San Diego. During the past year plaintiffs have sold lumber and other materials of the value in excess of one quarter of a million dollars which originated and were manufactured outside the State of California. Plaintiffs' business affects interstate commerce.

V

On or about the latter part of March, 1953, the defendants Millmen's Union, Local #2020, Building Material and Dump Truck Drivers, Local #36, and San Diego Building Trades Council presented a certain purported agreement to plaintiffs and demanded that plaintiffs sign the same. Said agreement contained the following provisions:

> "Pursuant to the terms of Section 8 (a) (3) of the Labor Management Relations Act, 1947, there shall be no limitation of the Employer as to whom he shall employ, continue in employment, or discharge, except that every employee listed under Section III, (A) and (B), hereof, not otherwise excluded, shall be, or shall make application within thirty (30) days become and remain a member in good standing of Millmen's Union, Local 2020, of the United Brotherhood of Carpenters and Joiners of America, or Building Material and Dump Truck Drivers, Local 36."

None of the defendants has offered or produced any evidence that any employee of plaintiffs has designated any of [fol. 3] the said Unions as his collective bargaining representative. None of the defendant Unions has been recognized by the plaintiffs or certified by the National Labor Relations Board as the representative of any employees of the plaintiffs. None of the defendants has been designated or is the collective bargaining agent for any employee of the plaintiffs, and plaintiffs are informed and believe that their employees do not desire to join or be represented by any of the defendants.

VI

Plaintiffs cannot execute the contract hereinabove referred to or any other contract containing a clause similar to that hereinabove set forth unless and until plaintiffs' employees, or some appropriate unit thereof, select and designate defendant Millmen's Union, Local #2020 and Building Material and Dump Truck Drivers, Local #36, or one of them, as their collective bargaining agent, because such conduct would be an interference with the collective bargaining rights secured to said employees by the National Labor Relations Act and would require the plaintiff to discharge, in violation of the said National Labor Relations Act, new employees who refused or failed to join one of the said defendant Unions within thirty days after their employment.

VII

Therefore plaintiffs declined to execute the said contract and informed the defendants Millmen's Union, Local #2020 and Building Material and Dump Truck Drivers, Local #36 that they could not enter into the said contract, or any contract, containing the provisions hereinabove mentioned, unless and until it should appear that the plaintiffs' employees, or some appropriate unit thereof, designates one of the defendant Unions as their collective bargaining agent.

VIII

That the defendants nevertheless on or about the 28th [fol. 4] day of April, 1953, placed pickets around the place of business of the plaintiffs in Escondido, California, and have ever since maintained pickets there.

IX

That said defendants have never made any other demand than the above set forth and have never offered any other agreement than as hereinabove set forth; by the placing of the picket line about the plaintiffs' place of business the said defendants intended to compel the plaintiffs to enter into an agreement containing a provision such as that set forth above and did not intend to induce the employees of the plaintiffs to join the said Unions or to accomplish any

other objective than to compel the plaintiffs to execute one of the said agreements without regard to the legality of doing so.

X.

By the use of the said pickets and by other means and in order to compel the plaintiffs to execute the said agreement, even though it would be illegal to do so, the defendants, and each of them, have induced a number of the contractors engaged in the construction industry in or about the City of Escondido to cease doing business with plaintiffs and to refuse to accept deliveries in plaintiffs' trucks and have induced various suppliers of materials and common carriers of freight to refuse to make deliveries to plaintiffs, and thereby have injured plaintiffs' business and put the plaintiffs to great expense in making deliveries and picking up supplies purchased by them.

XI

As a result of the acts of the defendants the plaintiffs have lost business and profits and their business has been damaged in the sum of Seven Hundred Fifty Dollars ($750.00). The defendants threatened to and unless restrained by this Court will continue the acts hereinabove set [fol. 5] forth and thereby plaintiffs will continue to lose business and profits and their business will be damaged at the rate of approximately One Hundred Fifty Dollars ($150.00) per working day. In addition plaintiffs will lose contracts, the exact nature and amount of which are unknown, and will suffer injuries not measurable in money or damages. Thereby plaintiffs will suffer great and irreparable injury not compensable by damages. Plaintiffs have no plain, speedy or adequate remedy at law.

Wherefore, plaintiffs pray that they be awarded judgment as follows:

1. That plaintiffs be awarded damages in the sum of Seven Hundred Fifty Dollars ($750.00), and the further sum of One Hundred Fifty Dollars ($150.00) for each and every day the acts complained of continue thereafter.

2. That the defendants, and each of them, be enjoined from picketing the plaintiffs' places of business, inducing

contractors to refuse to accept delivery in the plaintiffs' trucks, inducing suppliers to refuse to make deliveries to plaintiffs, or do any other act to injure or intending or intended to injure the plaintiffs' business in order to compel the plaintiffs to execute the contract demanded by them, or any other contract containing the provisions set forth in paragraph V thereof, or any similar provisions unless and until the defendants Millmen's Union, Local #2020 and Building Material and Dump Truck Drivers, Local #36, or one of the-, has been properly designated as collective bargaining representative of plaintiffs' employees or of any appropriate unit thereof.

3. That plaintiffs be awarded their costs of suit herein incurred together with such other and further relief as the Court may deem just and equitable.

Gray, Cary, Ames & Frye, Attorneys for Plaintiffs.

[fol. 6] *Duly sworn to by J. M. Garmon; jurat omitted in printing.*

[fol. 7] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

[Title Omitted]

DEMURRER—Filed May 12, 1953

Come *mow* defendants, San Diego Building Trades Council, Millmen's Union, Local #2020, Building Material and Dump Truck *Building Material and Dump Truck* Drivers, Local #36, and by this, their demurrer to the complaint on file herein, as and for grounds of demurrer, specify:

I

That said complaint does not state facts sufficient to constitute a cause of action.

II

That said complaint does not state facts sufficient to constitute a cause of action against these defendants, or any of them.

III

That this Court has no jurisdiction of the alleged cause of action herein in that the acts, if illegal and actionable at [fol. 8] all, come within the sole jurisdiction of the Federal agencies of the United States.

IV

That this Court has no jurisdiction of the alleged cause of action herein in that the complaint seeks to abridge the constitutional rights of these defendants which are protected by the Bill of Rights of the United States Constitution.

V

That this Court has no jurisdiction of the alleged cause of action herein in that the amount of damages prayed for does not bring the case within the jurisdiction of this Court.

VI

That said complaint is uncertain in this, in that it does not appear therein, nor can it be ascertained therefrom:

a. How or in what manner the acts alleged in Paragraph V of the complaint are in violation of any law of the State of California;

b. How or in what manner the acts alleged in Paragraph VIII are in violation of any law of the State of California;

c. How or in what manner the acts alleged in Paragraph X are in violation of any law of the State of California;

d. How or in what manner plaintiffs have been damaged in the sum prayed for or in any other sum or amount whatever;

e. How or in what manner plaintiffs damage, if any, is "not compensable in damages"; and

f. How or in what manner plaintiffs have no remedy at law.

VII

That said complaint is ambiguous in each of the respects in which it is hereinabove specified as uncertain.

VIII

That said complaint is unintelligible in each of the respects in which it is hereinabove specified as uncertain. [fol. 9] Wherefore, these defendants pray that plaintiffs take nothing by this their said action, and that these defendants go hence with their costs.

Dated this — day of May, 1953.

John T. Holt, Clarence E. Todd, Thomas Whelan,
Attorneys for Demurring Defendants.

POINTS AND AUTHORITIES ON
DEMURRER AND MOTION TO STRIKE

1. The acts alleged, if unlawful at all, are unlawful under the provisions of the Labor Management Relations Act of such acts the Federal Courts and agencies have exclusive jurisdiction.

Amalgamated vs. Wisconsin ERB 340 US 383.
Hill vs. Florida 325 US 538.
Bethlehem Steel vs. New York Board 330 US 767.
LaCrosse Tel. Co. vs. Wisconsin Board 336 US 18.
Blankinton Packing Co. vs. Wisconsin Board 338 US 953.
International Union vs. O'Brien 339 US 454.
NLRB vs. Industrial Commission of Utah 84 F Supp 487.
Garry of Cal vs. Superior Court 32 Cal 2d 119.
Ex parte De Silva 33 Cal 2d 76.
2. Under California law the acts charged are lawful.
McKay vs. Retail Auto Salesmen 16 Cal 2d 319, 322.
Shafer vs. Associated Pharmacists 16 Cal 2d 379, 382
Park & Tilford vs. Teamsters 27 Cal 2d 599, 604, 606, 607.
In re Blaney 30 Cal 2d 643.
7 Up Bottling Co. vs. Grocery Drivers 40 AC 378, 379.
Haggerty vs. Kings Co. 117 ACA 582.
Bank of America v. Williams 89 CA 2d 21.
CCP 430 and CCP 452.

[fol. 10] 3. These defendants hereby refer to and incorporate herein the Points and Authorities filed by defendants in

the case of Benton vs. Painters #176075 of the files of this Court.

Respectfully submitted, John T. Holt, Clarence E. Todd, Thomas Whelan, Attorneys for Demurring Defendants.

I hereby certify that the above demurrer is filed in good faith and not for delay, and I further certify that in my opinion the same is good in point of law.

Clarence E. Todd.

[fol. 11] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

No. 180,903

[Title Omitted]

ANSWER—Filed May 21, 1953

Come now defendants above named and by this, their Answer to the Complaint of plaintiffs on file herein, admit, deny and allege as follows:

I.

Answering Paragraph I of said complaint, defendants have no information or belief sufficient to enable them to answer said Paragraph I, and basing their denial on that ground, deny each and every, all and singular, the allegations of said Paragraph I.

II.

Defendants have no information or belief sufficient to enable them to answer Paragraph IV of said complaint, and basing their denial on that ground, deny each and every, all and singular, the allegations of said Paragraph IV.

[fol. 12]

III.

Answering Paragraphs V, VI and VII of said complaint, defendants deny each and every, all and singular, the allega-

tions of said paragraphs, and in that behalf allege that defendants have been for a long time desirous of organizing the employees of plaintiffs' plant. That defendants have contacted the employees of plaintiffs and have discussed with them the affiliation of said employees with one or the other of defendant unions, and pursuant to said conversations defendants believe that said employees were and are desirous of becoming members of one or the other of defendant organizations, but that they are prevented from such action by the hostile attitude of plaintiffs and that said employees are fearful of being discharged from their jobs if they should affiliate with any of defendant unions.

That defendants presented to plaintiffs a proposed agreement containing the paragraph set out in Paragraph V, page 2 of plaintiffs' complaint. That defendants made no demand upon plaintiffs for signature of said agreement at any particular time, but in view of their conversations with the said employees of plaintiffs, defendants believed that one or more of defendant organizations would soon be selected as the collective bargaining agent of said employees; that defendants on presenting said proposed agreement to plaintiffs stated to plaintiffs that defendants would not enter into the agreement without the consent of plaintiffs' employees and without full knowledge by said employees of the contents of said agreement; that furthermore, defendants caused said proposed agreement to be read to the employees of plaintiffs; that defendants desired and so assured plaintiffs that such agreement be executed in a legal manner and in compliance with law, both Federal and state. That said proposed agreement has never been executed and none of plaintiffs' employees has ever joined either of said unions, for the reason aforesaid, according to the best [fol. 13] knowledge and belief of defendants, namely, that plaintiffs are hostile to these defendant unions and to all unions, never to the knowledge of defendants having had any union men in their employ.

IV.

Defendants deny each and every, all and singular, the allegations of Paragraphs VIII and IX of said complaint, and in that behalf defendants allege that a picket line was

placed near the plant of plaintiffs for the purpose of inducing plaintiffs' employees to join one or the other of defendant unions, and for the purpose of publicizing the dispute of defendants with plaintiffs; that said pickets carried banners containing the following language:

"A. F. of L.
Picket
Millmen's Local 2020
Teamsters Local 36
Invites Employees To Join"

That no banner has ever been carried on said picket line containing any other or different language; that said picketing has at all times been peaceful in character and said picket line has never at any time been conducted in any manner in violation of any law, either state or national.

V.

Answering Paragraph X of said complaint, defendants deny each and every, all and singular, the allegations of said Paragraph X, and in that behalf defendants allege that, as hereinabove stated, defendants have never sought to secure the signature of plaintiffs to the said or any contract in any manner in violation of any law; that defendants are informed and believe and therefore allege that on certain occasions, certain persons, friendly to organized labor, have refused to pass the said picket line and have refused to do [fol. 14] business with plaintiffs as they would refuse to do business with any other concern unfair to organized labor. These defendants deny positively and absolutely that they have ever conducted any secondary boycott against plaintiffs or have indulged in any secondary boycott activities whatever against plaintiffs. That defendants have no information or belief sufficient to enable them to answer the allegations of said Paragraph X with regard to any damage suffered by plaintiffs from lawful acts of these defendants, and basing their denial on that ground, defendants deny that any damage has been suffered by plaintiffs in that behalf.

VI.

Defendants have no information or belief sufficient to enable them to answer the allegations of Paragraph XI of said complaint, and basing their denial on said ground, defendants deny each and every, all and singular, the allegations of said Paragraph XI.

VII.

That, as aforesaid, following a long-continued policy of these defendants, there was presented to the plaintiffs the contract referred to in the complaint, and the plaintiffs were informed by representatives of these defendants that no contract would be signed covering the employees of plaintiffs until the employees of plaintiffs were thoroughly familiar with the contract and the terms therein contained, since the employees would have certain rights and obligations as individuals under the contract, and the policy of these defendants is that each person covered by a contract with any of the defendants shall know the provisions in the contract and the rights and obligations of such employees; these defendants deny that said proposed agreement was presented to the plaintiffs under any other conditions whatsoever, except as in this answer alleged.

VIII.

Defendants deny by this paragraph each and every, all and singular, the allegations of the complaint on file herein [fol. 15] not herein specifically admitted or denied.

For a further, separate and second defense, defendants allege that plaintiffs have not exhausted their remedies under the law, to-wit, the Labor Management Relations Act, which plaintiffs invoke by alleging that their business is in interstate commerce.

For a further, separate and third defense, defendants allege that this Court has no jurisdiction of this cause of action, since the complaint alleges that the business of plaintiffs is in interstate commerce; and

For a further, separate and fourth defense, these defendants allege that the Court has no jurisdiction of this cause of action, since it is sought by this action to abridge the

constitutional rights of these defendants protected under the First and Fourteenth Amendments to the Constitution of the United States and Sections 9 and 10 of Article I of the Constitution of the State of California.

Wherefore, these defendants pray that plaintiffs take nothing by this, their said action, and that defendants go hence with their costs.

Todd and Todd, John T. Holt, Thomas Whelan, By Clarence E. Todd, Attorneys for Defendants

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[fol. 16] *Duly sworn to by Walter J. De Bruner; jurat omitted in printing.*

[fol. 17] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

No. 180903

J. S. GARMON, J. M. GARMON and W. A. GARMON, Plaintiffs,

vs.

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL #2020, BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL #36, JOHN DOES I TO X INCLUSIVE, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—July 30, 1953

The above entitled case came on regularly for trial on the 1st day of June, 1953, before the Honorable John A. Hewicker, judge of the Superior Court, in Department One thereof, Gray, Cary, Ames & Frye by James W. Archer appearing for plaintiffs and Thomas Whelan, John T. Holt and Todd & Todd by Clarence E. Todd appearing for defendants, and evidence having been introduced and said case having been fully tried, argued and submitted, and the court having been fully advised in the premises, the court makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

Plaintiffs are co-partners engaged in the lumber business in San Diego County under the name of Valley Lumber Company and duly published and filed a notice that they [fol. 18] are engaged in a business under the said name.

II.

Defendant San Diego Building Trades Council is an association of labor organizations affiliated with the American Federation of Labor. Defendant Millmen's Union, Local #2020 is a labor organization affiliated with the American Federation of Labor and a member of the defendant San Diego Building Trades Council. Defendant Building Material and Dump Truck Drivers, Local #36 is a labor organization affiliated with the American Federation of Labor and a member of the defendant San Diego Building Trades Council.

III

Plaintiffs are engaged in the business of selling lumber and other building materials in the City of Escondido and elsewhere in the County of San Diego. During the past year plaintiffs have sold lumber and other materials of the value in excess of one quarter of a million dollars which originated and were manufactured outside of the State of California. Plaintiffs' business affects interstate commerce.

IV

On or about the latter part of March, 1953, the defendants Millmen's Union, Local #2020, Building Material and Dump Truck Drivers, Local #36, and San Diego Building Trades Council presented a certain purported agreement to plaintiffs and demanded that plaintiffs sign the same. Said agreement contained the following provisions:

"Pursuant to the terms of Section 8 (a) (3) of the Labor Management Relations Act, 1947, there shall be no limitation of the Employer as to whom he shall employ, continue in employment, or discharge, except that every employee listed under Section III, (A) and

(B), hereof, not otherwise excluded, shall be, or shall make application within thirty (30) days become and remain a member in good standing of Millmen's Union, Local 2020, of the United Brotherhood of Carpenters and Joiners of America, or Building Material and Dump Truck Drivers, Local 36."

None of the defendants has offered or produced any evidence [fol. 19] that any employee of plaintiffs has designated any of the said Unions as his collective bargaining representative. None of the defendant Unions has been recognized by the plaintiffs or certified by the National Labor Relations Board as the representative of any employee of the plaintiffs. None of the defendants has been designated or is the collective bargaining agent for any employee of the plaintiffs and the said employees have indicated that they do not desire to join or be represented by any of the defendants.

V

Therefore plaintiffs declined to execute the said contract and informed the defendants Millmen's Union, Local #2020 and Building Material and Dump Truck Drivers, Local #36 that they could not enter into the said contract, or any contract, containing the provisions hereinabove mentioned, unless and until it should appear that the plaintiffs' employees, or some appropriate unit thereof, designates one of the defendant Unions as their collective bargaining agent.

VI

On or about the 28th day of April, 1953, the defendants placed pickets around the place of business of the plaintiffs in Escondido, California, and maintained pickets there up to and including the trial of this action.

VII

Said defendants have never made any other demand than the above set forth and have never offered any other agreement than as hereinabove set forth; by the placing of the picket line about the plaintiffs' place of business the said defendants intended to compel the plaintiffs to enter into an agreement containing a provision such as that set forth

above and did not intend to induce the employees of the plaintiffs to join the said unions or to educate the plaintiffs, or the employees of plaintiffs, or to inform said employees of the benefits of unionization, or to accomplish any other objective than to destroy the business of plaintiffs or to [fol. 20] compel plaintiffs to execute one of the said agreements without regard to the legality of doing so.

VIII

By the use of the said pickets and by following the plaintiffs' trucks, and by threatening persons doing business with plaintiffs, and persons entering, or about to enter, plaintiffs' place of business in Escondido with economic injuries, and by using language in the said picket lines calculated to instill fear of economic injury in such persons and by other means, and in order to compel the plaintiffs to execute the said agreement, even though it would be illegal to do so, the defendants, and each of them, have induced a number of the contractors engaged in the construction industry in or about the City of Escondido to cease doing business with plaintiffs and to refuse to accept deliveries in plaintiffs' trucks and have induced various suppliers of materials and common carriers of freight to refuse to make deliveries to plaintiffs, and have prevented persons intending to enter plaintiffs' place of business in Escondido from doing so, and thereby have injured plaintiffs' business and put the plaintiffs to great expense in making deliveries and picking up supplies purchased by them.

IX

As a result of the acts of the defendants the plaintiffs have lost business and profits and their business has been damaged in the sum of $1,000.00. The defendants, and each of them, continued their picketing and other activity as hereinabove set forth until the trial of the case, and unless restrained by this Court will continue said acts and continue to cause similar injury to plaintiffs' business. The said acts are of a type not measurable in money and of a type not fully compensable by damages.

X

The National Labor Relations Board has, pursuant to a policy declared by it, refused to take jurisdiction of the [fol. 21] controversy between plaintiffs and defendants for the purpose of determining whether defendants should be designated as the collective bargaining representative of the employees of plaintiffs.

CONCLUSIONS OF LAW

I

The business of the plaintiffs affects interstate commerce and is subject to the National Labor Relations Act.

II

The picketing of the defendants is for an improper purpose to wit, to compel the plaintiffs to enter into a contract which will require it to commit an unfair labor practice by discriminating with respect to employment of new employees, and with respect to conditions of employment with existing employees by reason of union membership or lack thereof, although the defendants are not the collective bargaining representatives of the employees of plaintiffs within the meaning of the National Labor Relations Act.

III

The defendants, and each of them, are liable to plaintiffs in the sum of $1,000.00, and the plaintiffs are entitled to damages against defendants, and each of them, in the said sum.

IV

Plaintiffs are entitled to an Injunction enjoining defendants, and each of them, and their officers, members, agents, employees and all others acting on their behalf, from picketing the places of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, expressed or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to

refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure [fol. 22] plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof.

V

Plaintiffs are entitled to their costs of suit herein incurred.

Dated: July 30th, 1953.

John A. Hewicker, Judge of the Superior Court.

[fol. 23] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

[Title Omitted]

[File Endorsement Omitted]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY PLAINTIFFS— Filed July 30, 1953.

Come now the defendants San Diego Building Trades Council, Millmen's Union, Local #2020, and Building Material and Dump Truck Drivers, Local #36, and each of them, and object, and each of them objects, to the Findings of Fact and Conclusions of Law submitted by plaintiffs herein, and propose in place and stead of the Findings of Fact and Conclusions of Law objected to, the following:

I

Defendants object to the proposed Findings with reference to defendant Millmen's Union Local #2020, in para-

[fol. 24] graph II of plaintiffs' proposed findings, on Page 2, lines 5 to 7, and propose the following:

Proposed Paragraph II.

II

"Defendant Millmen's Union, Local #2020, is a labor organization affiliated with the San Diego District Council of Carpenters, and with the International Brotherhood of Carpenters and Joiners of America, and with the American Federation of Labor, *but is not a member of the defendant San Diego Building Trades Council.*"

II

Defendants object to paragraphs IV and V of plaintiffs' proposed Findings of Fact, and propose the following, to be numbered paragraphs IV and V:

Proposed Paragraph IV.

IV.

"That on or about November 15, 1952, the defendants Millmen's Union, Local #2020, Building Material and Dump Truck Drivers, Local #36, and San Diego Building Trades Council, presented a form of agreement to plaintiffs, which, among other things, contained the following provision:

'Pursuant to the terms of Section 8 (a) (3) of the Labor Management Relations Act, 1947, there shall be no limitation of the Employer as to whom he shall employ, continue in employment, or discharge, except that every employee listed under Section III, (A) and (B), hereof, not otherwise excluded, shall be, or shall make application within thirty (30) days become and remain a member in good standing of Millmen's Union, Local 2020, of the United Brotherhood of Carpenters and Joiners of America, or Building Material and Dump Truck Drivers, Local 36.'

[fol. 25] "That at the time said form of agreement was presented to plaintiffs, no demand was made upon plaintiffs that plaintiffs sign said form of agreement, but that defendants in fact stated to plaintiffs in sub-

stance, then and thereafter and up to the time that a picket line was placed in front of the place of business of the plaintiffs on April 28, 1953, that the defendant Unions would not ask plaintiffs to sign said agreement unless and until the defendant Unions referred to in said form of agreement, represented the employees of plaintiffs as the bargaining agent of said employees of plaintiffs."

Proposed Paragraph V.

V.

"That on or about Thursday, March 26, 1953, representatives of defendants were presented to the employees of the plaintiffs in the yard of the Valley Lumber Company, and thereafter a conference was had between the representatives of defendants and the employees of plaintiffs; that during said conference the provisions of the proposed form of agreement was discussed with the employees of plaintiffs, and during the course of the meeting the employees of plaintiffs signified and indicated to the representatives of defendant Unions, that they, the said employees of plaintiffs, would become members of the respective Unions mentioned in said contract, and said employees of said plaintiffs signified and indicated to the representatives of defendant Unions, that the defendant Unions would [fol. 26] be and were selected by said employees as their bargaining representatives for the purpose of collective bargaining with plaintiffs.

"That on said March 26, 1953, a representative of defendant Unions notified plaintiffs of the willingness of plaintiffs' employees to become members of defendant Unions, and to select defendant Unions as the bargaining agents of the said employees of the plaintiffs for the purpose of collective bargaining with plaintiffs.

"That thereafter plaintiffs interfered with and prevented the employees of plaintiffs from becoming members of the defendant Unions by indicating to said employees a hostile attitude on the part of plaintiffs towards defendant Unions, and further by giving and granting to all of the employees of the yard of Valley

Lumber Company a blanket increase of pay effective as of March 28, 1953.

"That the hostile attitude of plaintiffs towards the defendant Unions was communicated to the employees of plaintiffs directly by the plaintiffs J. S. Garmon and J. M. Garmon.

"That as a consequence of said hostile attitude of plaintiffs and the granting of said blanket increase in pay, the employees of plaintiffs changed their minds towards becoming members of defendant Unions, and selecting the defendant Unions as their bargaining agents for the purpose of collective bargaining on the part of said employees with plaintiffs.

"That thereafter plaintiffs notified defendants that [fol. 27] the employees of plaintiffs did not desire to become members of defendant Unions, and as a consequence plaintiffs could not sign any contract with defendant Unions containing the provisions hereinabove set forth as being contained in a form of agreement left with plaintiffs."

III

Defendants object to the proposed Findings of Fact contained in paragraphs VI and VII submitted by plaintiffs, on the ground that said proposed findings are not sustained by the evidence, and defendants propose in lieu thereof the following as paragraphs VI and VII:

Proposed Paragraph VI.

VI.

"On or about the 28th day of April, 1953, the defendants placed pickets around the place of business of the plaintiffs near Escondido, California, and maintained said pickets there up to the time a temporary restraining order was issued on May 7, 1953; that thereafter the picketing was discontinued until said temporary restraining order was dissolved on May 18, 1953. That commencing again on Tuesday, May 19, 1953, said pickets were reinstated around the place of business of plaintiffs, and were maintained there up to the time of the oral decision of the Court on Thursday, June 4,

1953; that after the oral decision of the Court said picketing was discontinued."

Proposed Paragraph VII.

VII.

"That the picketing on the part of defendants was entirely peaceful, and the picket who patrolled [fol. 28] on the public highway in front of the entrance to plaintiffs' place of business carried a banner which contained the following language:

'A. F. of L.

Picket

Millmen's Local 2020
Teamsters Local 36

Invites Employees To Join'

"That there was neither violence, nor any disturbance, nor any untruthful or false statements made in connection with said picketing, nor was there any unlawfulness or invalidity on the part of the picketing, unless such unlawfulness or invalidity was in violation of the Labor Management Relations Act of 1947, (29 U.S.C. Sec. 158 ((b)) ((2)).

"That said picketing was not carried on for the purpose of intending to compel plaintiffs to enter into an agreement, nor was it carried on for the purpose of injuring plaintiffs' business, but was carried on only for the purpose of persuading the employees of plaintiffs to become members of either Millmen's Union, Local #2020, or Building Material and Dump Truck Drivers, Local #36."

IV

Defendants object to paragraphs VIII and IX of plaintiffs' proposed Findings of Fact on the ground that the proposed Findings of Fact contained in said paragraphs VIII and IX are not sustained by the evidence.

[fol. 29] Defendants object to paragraph X of plaintiffs'

proposed Findings of Fact on the ground that said Finding is irrelevant and immaterial, and beyond the issues raised by the pleadings.

Defendants further object to said Findings contained in plaintiffs' proposed paragraph X on the ground that said Finding is not supported by the evidence.

VI

Defendants propose a Finding in lieu of plaintiffs' proposed Findings contained in paragraph VIII as follows:

Proposed Paragraph VIII.

VIII

"That any interference with the business of plaintiffs and the general public was caused only by reason of the fact that certain persons friendly to organized labor have refused to pass an A. F. of L. picket line, and have refused to do business with plaintiffs as they would refuse to pass an A. F. of L. picket line, and would refuse to do business with any other firm or concern who was unfair to organized labor."

VII

Defendants propose certain Findings of Fact not referred to in plaintiffs' proposed Findings of Fact, to be contained in proposed paragraph IX.

Proposed Paragraph IX.

IX

"That neither plaintiffs, nor plaintiffs' attorneys, have filed with the National Labor Relations Board any charge of an unfair labor practice on the part of defendants, although plaintiffs' attorneys are familiar with [fol. 30] the provisions of the Labor Management Relations Act of 1947, and particularly with the provisions of Sec. 160, Title 29, U.S.C.A."

Conclusions of Law

I

Defendants object to plaintiffs' proposed Conclusions of Law contained in paragraph II of the Conclusions of Law submitted by plaintiffs, and propose the following:

Proposed Paragraph II

II

"The picketing of the defendants' place of business was for a proper and lawful purpose, to wit: to invite the employees of plaintiffs to join and become members of the defendant Unions."

II

Defendants object to the Conclusions of Law contained in paragraphs III, IV and V of the proposed Conclusions of Law submitted by plaintiffs on the ground that the proposed Conclusions of Law are contrary to the law of the State of California, and of the United States of America.

III

Defendants propose a Conclusion of Law to be known as paragraph III as follows:

Proposed Paragraph III.

III

"That plaintiffs have not exhausted their remedies under the law, to wit: the Labor Management Relations Act of 1947.

IV

Defendants propose a further Conclusion of Law to be [fol. 31] known as paragraph IV.

Proposed Paragraph IV.

IV

"That the Superior Court of the State of California in and for the County of San Diego, has no jurisdiction of plaintiffs' cause of action."

V

Defendants propose a further Conclusion of Law to be known as paragraph V.

Proposed Paragraph V.

V

"That under the First and Fourteenth Amendments to the Constitution of the United States, and Secs. 9 and 10 of Article I of the State of California, this Court can grant no relief to plaintiffs because of the activities of defendants, as disclosed by the evidence."

Defendants respectfully submit that the proposed Findings of Fact, and proposed Conclusions of Law, be amended in conformity with the proposal of the defendants concerning the Findings of Fact and Conclusions of Law herein set forth.

Dated at San Diego, California, July 10, 1953.

Todd and Todd, and Clarence E. Todd, John T. Holt and Thomas Whelan, By Thomas Whelan, Attorneys for Defendants.

[fol. 32] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

No. 180903

J. S. GARMON, J. M. GARMON and W. A. GARMON, Plaintiffs,

vs.

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL #2020, BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL #36, JOHN DOES I TO X INCLUSIVE, Defendants.

JUDGMENT—July 31, 1953

The above entitled case came on regularly for trial on the 1st day of June, 1953, before the Honorable John A. Hew-

icker, judge of the Superior Court, in Department One thereof, Gray, Cary, Ames & Frye by James W. Archer appearing for plaintiffs and Thomas Whelan, John T. Holt and Todd & Todd by Clarence E. Todd appearing for defendants, and evidence having been introduced and said case having been fully tried, argued and submitted, and the court having been fully advised in the premises, and the court having made its Findings of Fact and Conclusions of Law, now, therefore, pursuant to the said Findings of Fact and Conclusions of Law;

It is ordered, adjudged and decreed that the defendants [fol. 33] be, and they and each of them and their officers, members, agents, employees and all others acting on their behalf are hereby enjoined from picketing the places of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, expressed or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof;

It is further ordered, adjudged and decreed that the plaintiffs have and recover from the defendants and each of them, damages in the sum of One Thousand Dollars ($1000.00) together with their costs of suit herein incurred in the amount of $41.90.

Done in open court this 31 day of July, 1953.

John A. Hewicker, Judge of the Superior Court

[fol. 34] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

[Title omitted]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL —Filed Aug. 13, 1953

To: J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs, and to Messrs. Gray, Cary, Ames & Frye, and James W. Archer, and Ward Waddell, Jr., their attorneys:

You and each of you will please take notice that defendants San Diego Building Trades Council, Millmen's Union, Local 2020, and Building Material and Dump Truck Drivers, Local 36, intend to move the above-entitled court to vacate and set aside its decision rendered in the above entitled action as to said defendant, and to grant a new trial of said cause upon the following grounds materially affecting the substantial rights of said defendants, to wit:

1. Insufficiency of the evidence to justify the decision of the court;

[fol. 35] 2. That the decision is contrary to the evidence;

3. That the decision is against law;

4. Errors in law occurring at the trial and excepted to by said defendants and each of them;

5. That the court was without jurisdiction of the subject matter of the action;

6. That the court was without jurisdiction to grant injunctive relief;

7. That the court was without jurisdiction to grant or allow damages to plaintiffs.

Said motion will be made and based upon the minutes of the court and upon all of the records in this case.

Dated this 13 day of August, 1953.

Todd & Todd, John T. Holt and Thomas Whelan, Attorneys for said Defendants, By Thomas Whelan.

[fol. 36] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

[Title omitted]

NOTICE OF APPEAL, NOTICE TO CLERK TO PREPARE CLERK'S TRANSCRIPT, AND NOTICE TO REPORTER TO PREPARE REPORTER'S TRANSCRIPT—Filed Aug. 31, 1953

To the clerk of the above-entitled court:

You will please take notice that the defendants San Diego Building Trades Council, Millmen's Union, Local No. 2020, and Building Material and Dump Truck Drivers, Local No. 36, do hereby appeal: (1) From the Order made and entered herein on the 20th day of May, 1953, overruling the Demurrer of said defendants, at the time the temporary injunction was issued, and (2) from the Judgment entered on the 4th day of August, 1953.

Said defendants do hereby request you to prepare a transcript for use on appeal herein, which transcript should include the following:

1. Complaint for Injunctive Relief and Damages;

[fol. 37] 2. Demurrer of defendants San Diego Building Trades Council, Millmen's Union, Local 2020, and Building Material and Dump Truck Drivers, Local 36;

3. Order of the above-entitled Court made and entered herein on the 20th day of May, 1953, overruling said Demurrer, at the time the temporary injunction was issued;

4. Answer of defendants San Diego Building Trades Council, Millmen's Union, Local 2020, and Building Material and Dump Truck Drivers, Local 36;

5. Findings of Fact and Conclusions of Law;

6. Objections to Findings of Fact and Conclusions of Law submitted by defendants San Diego Building Trades Council, Millmen's Union, Local 2020, and Building Material and Dump Truck Drivers, Local 36;

7. Judgment of the above entitled Court made and entered herein on the 4th day of August, 1953;

8. Notice of Intention to Move for New Trial of defend-

ants San Diego Building Trades Council, Millmen's Union, Local 2020, and Building Material and Dump Truck Drivers, Local 36;

9. Motion of defendants San Diego Building Trades Council, Millmen's Union, Local 2020, and Building Material and Dump Truck Drivers, Local 36, made in open court on Tuesday, August 18th, 1953, together with the order of court denying said motion for new trial;

10. Clerk's minutes re all orders of Court made and entered herein;

11. Notice of Appeal, Notice to Clerk to Prepare Clerk's Transcript, and Notice to Reporter to Prepare Reporter's Transcript of defendants San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Truck Drivers, Local 36.

[fol. 38] To the reporter of the above-entitled court:

You are hereby notified that defendants San Diego Building Trades Council, Millmen's Union, Local 2020, and Building Material and Dump Truck Drivers, Local 36, request you to prepare a complete transcript of all of the proceedings upon the trial of the above-entitled matter, including but not limited to, the remarks and opinions of the Court delivered herein on the 4th day of June, 1953, to the conclusion of said trial, the oral motion for new trial made on Tuesday, August 18th, 1953, and the remarks and opinions of the Court delivered herein on the 18th day of August, 1953, at the time of argument upon Motion for New Trial, at which time the Motion for New Trial was denied.

Dated this 26th day of August, 1953.

Todd and Todd, John T. Holt, and Thomas Whelan,
Attorneys for said Defendants, By Thomas Whelan

[fol. 39] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

[Title omitted]

NOTICE DESIGNATING ADDITIONAL DOCUMENT TO BE INCLUDED IN RECORD—Filed Sept. 11, 1953

To the clerk of the above-entitled court:

Respondents designate the following additional document to be included in the record on appeal:

The exhibits admitted in evidence.

Respondents request that the said exhibits not be copied and that the original exhibits be transmitted to the above-named Court.

Gray, Cary, Ames & Frye, Attorneys for Respondents.

[fol. 40] IN SUPERIOR COURT OF SAN DIEGO COUNTY

HON. JOHN A. HEWICKER, Judge Presiding

No. 180 903

J. S. GARMON, et al

vs.

San Diego Building Trades Council, et al:

ORDER DENYING MOTION FOR NEW TRIAL—August 18, 1953

This being the time for hearing defendants motion for a new trial comes plaintiffs by J. W. Archer and defendants by Thomas Whelan and J. T. Holt.

Counsel waive the statutory time for Notice and Hearing of the motion. The motion is submitted without argument and the Court denies the same.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ORDER TRANSFERRING APPEAL TO DISTRICT COURT OF APPEAL

The following appeals are transferred to the District Court of Appeal, Fourth Appellate District:

L.A. 23005, Garmon v. San Diego Building Trades Council.

Filed Nov. 20, 1953, William I. Sullivan, Clerk, By S.F. Deputy

Gibson, Chief Justice

[fol. 43] IN THE DISTRICT COURT OF APPEAL IN AND FOR THE FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

4th Civil No. 4854

J. S. GARMON, J. M. GARMON AND W. A. GARMON, Plaintiffs and Respondents,

vs.

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 36, Defendants and Appellants.

OPINION—August 24, 1954

Appeal from a judgment of the Superior Court of San Diego County. John A. Hewicker, Judge. Reversed.

Todd and Todd; Thomas Whelan; and John T. Holt for appellants.

Gray, Cary, Ames & Frye; James W. Archer; and Ward W. Waddell, Jr. for respondents.

[fol. 44] Plaintiffs, who are owners and proprietors as copartners of a lumber business operating under the name of Valley Lumber Company, brought this action on May 7, 1953, to enjoin defendants from picketing plaintiff's place of business and for damages.

On or about November 15, 1952, Morris Collins, secretary of defendant San Diego Building Trades Council, called at plaintiff's place of business in Escondido and requested plaintiffs to sign a union contract. The contract submitted required plaintiffs to employ union labor in that it required plaintiffs' employees to be or become and remain members in good standing of defendant unions. Plaintiffs refused to sign this agreement, stating that they had no request from their men so to do. Thereafter Collins called on plaintiffs several times and was told that they were not ready to sign; that they did not know whether their employees wanted to become union members or not; and that Collins could discuss the matter with them.

Mr. Rutledge, plaintiffs' yard foreman, testified that on or about April 1, 1953, he was present when Mr. Garmon brought Collins into the yard to talk to the men; that Collins read the agreement to them and explained its provisions; that the men discussed it and decided at that time to leave it up to plaintiffs as to whether they "wanted the union to enter"; that subsequent to this meeting a second meeting was held at which no representative of the management or unions was present and at which the men definitely decided not to join the union; that plaintiffs had informed their [fol. 45] employees that it was up to them to decide whether they wished to join the union; and that about the middle of April he informed the union representatives of the decision of the men not to become union members.

Plaintiff William Garmon testified that after Collins talked with the men he stated they "were interested"; that a few days later he told Collins that as far as he knew, the men were perfectly satisfied and that he saw no advantage to plaintiffs in signing a contract; that the men had not requested such action; that some time in April a Mr. Taylor (a union representative) came in and "wanted to know if we were ready to sign up their contract with them and I told him no and he says, 'Well, we are just going to have to do this the hard way'. I told him, 'You will just have to do it. We are not willing to sign any contract and if that is the way you want to do it, you will just have to do it the hard way.' So he left and he said, 'I will see you with a picket tomorrow morning' "; that the next morning, April 28th,

a picket was placed near the entrance to plaintiffs' yard but on the highway and not on plaintiffs' property. The picket carried a banner of moderate size on which appeared the following:

"A. F. of L.

Picket

Millman's Union 2020
Teamster's Union 36

Invites Employees to Join."

[fol. 46] The picketing on the part of the unions was without violence, no untruths were claimed and there was no breach of the peace. There was only one banner carried at a time. There was no secondary boycott. No one was stopped entering or leaving plaintiff's property and no deliveries either way were stopped (by the defendants). There was evidence that on numerous occasions plaintiffs' trucks were followed when they made deliveries and that union trucks were seen circling jobs at which deliveries had been made and that as a result of this it was necessary for the plaintiffs to make delivery of merchandise through other yards.

There was testimony that union agent Collins told the manager of another lumber company in Escondido that "they couldn't do anything and that they guessed they would have to get tough with him now" (referring to the Valley Lumber Company), and that Collins told contractors and others that the Valley Lumber Company was being picketed.

The trial court found, in part, that during the past year plaintiffs have sold lumber and other materials of the value in excess of one quarter of a million dollars, which originated and were manufactured outside of the state of California; that plaintiffs' business affects interstate commerce; that defendants demanded that plaintiffs sign the union contract referred to herein; that none of the defendants offered or produced any evidence that any employee of plaintiffs has designated any of said unions as his collective bargaining representative; that none of the defendant un-
[fol. 47] ions had been recognized by the plaintiffs or cer-

tified by the National Labor Relations Board as the representative of any employee of the plaintiffs; that none of the defendants has been designated or is the collective bargaining agent for any employee of the plaintiffs and the said employees have indicated that they do not desire to join or be represented by any of the defendants; that the plaintiffs declined to execute the said contract and informed the defendants that they could not enter into it or any contract containing the provisions relative to union membership of the employees unless and until it should appear that the plaintiffs' employees or some appropriate unit thereof designates one of the defendants union as their collective bargaining agent; that on or about April 28, 1953, the defendants placed pickets around the place of business of plaintiffs in Escondido and maintained pickets there up to and including the trial of the action; that by the placing of the picket line about plaintiffs' place of business the defendants intended to compel the plaintiffs to enter into certain union agreements and did not intend to induce the employees of plaintiffs to join the said union or to educate the plaintiffs or the employees of plaintiffs or to inform said employees of the benefits of unionization or to accomplish any other objective than to destroy the business of plaintiffs or to compel plaintiffs to execute said agreement without regard to the legality of doing so; that by the use of said pickets and by following the plaintiffs' trucks and by threatening persons doing business with plaintiffs and per-
[fol. 48] sons entering or about to enter plaintiffs' place of business with economic injuries, and by using language in said picket lines calculated to instill fear of economic injury to such persons and by other means, and in order to compel the plaintiffs to execute the said agreement, even though it would be illegal to do so, the defendants and each of them have induced a number of the contractors engaged in the construction industry in or about the city of Escondido to cease doing business with plaintiffs and to refuse to accept deliveries in plaintiffs' trucks and have induced various suppliers of materials and common carriers of freight to refuse to make deliveries to plaintiffs and have prevented persons intending to enter plaintiffs' place of business from doing so and thereby have injured plaintiffs' business and put

them to great expense in making deliveries and picking up supplies purchased by them; that as a result of the acts of defendants plaintiffs have lost business and profits and their business has been damaged in the sum of $1,000.00; that the National Labor Relations Board has, pursuant to a policy declared by it, refused to take jurisdiction of the controversy between plaintiffs and defendants for the purpose of determining whether defendants should be designated as the collective bargaining representatives of the employees of plaintiffs.

Judgment was entered enjoining the defendants from picketing the place of business of plaintiffs, from following their trucks, from preventing by means of threats persons having business with the plaintiffs from entering the prem- [fol. 49] ises of plaintiffs, from inducing by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept deliveries of goods from plaintiffs and from doing any other acts intended to injure plaintiffs' business in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by means of membership, or lack thereof, in any labor organization unless and until defendants or any one or more of them have been properly designated as the collective bargaining representatives of plaintiffs' employees or an appropriate unit thereof, and that plaintiffs have and recover damages in the sum of $1,000.00.

It is first contended that the Superior Court had no jurisdiction to entertain the suit herein or enter the judgment appealed from. While the appellants contend that the evidence shows that defendants were picketing plaintiffs' place of business for the purpose of inviting the employees to join the union, there was evidence to support the trial court's finding that their purpose was to compel plaintiffs to execute a union contract when none of the unions involved had been designated as the collective bargaining agent for said employees. The determination of the purpose or object sought to be accomplished by the picketing was one of fact for the trial court. (Standard Grocer Co. v. Local No. 406 of A. F. of L., 321 Mich. 276; 32 N.W. 2d 519, 529.)

The National Labor Relations Act, as amended in 1947 (29 U.S.C.A. 1953 Cumulative Pocket Part, pages 48 and

[fol. 50] 49) provides that it is an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization and for a labor organization to force or require an employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of the title (Sec. 158 (4) (B).)

In Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 74 S. Ct. 161, decided December 14, 1953, petitioners were engaged in the trucking business and had 24 employees, four of whom were members of respondent Union. The trucking operations formed a link to an interstate railroad. No controversy, labor dispute or strike was in progress, and at no time had petitioners objected to their employees joining the union. Respondents, however, placed rotating pickets, two at a time, at petitioner's loading platform. None were employees of petitioner. They carried signs reading "Local 776 Teamsters Union (A. F. of L.) wants Employees of Central Storage & Transfer Co. to join them to gain union wages, hours and working conditions." Picketing was orderly and peaceful but drivers of other carriers refused to cross this picket line and, as most of petitioners' interchange of freight was with unionized concerns, their business fell off as much as 95 per cent. The court below found that respondents' purpose in picketing [fol. 51] was to coerce petitioners into compelling or influencing their employees to join the union and concluded, after reviewing the Labor Management Relations Act (29 U.S.C.A., sec. 141 et seq.) that such provisions for a comprehensive remedy precluded any state action by way of a different or additional remedy for the correction of the identical grievance. The Supreme Court said:

> "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appro-

priate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief....

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended [fol. 52] by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit.

"On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State."

In Capital Service v. National Labor Relations Board, 74 S. Ct. 699, decided May 17, 1954, it was held that where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right.

In Gerry of Calif. v. Superior Court, 32 Cal. 2d 119 [194 P. 2d 689] it was held that under the National Labor Rela-

tions Act as amended in 1947, the State court has no jurisdiction, at the suit of a private person to enjoin union activities affecting interstate commerce when covered by [fol. 53] the federal act. It was there said, quoting from Amalgamated U. Workers v. Consolidated Edison Co., 309 U.S. 261, 264 [60 S. Ct. 561, 84 L. Ed. 738]:

> "'Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.' The Supreme Court pointed out that the course of procedure was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair labor practice; that the board was chosen as the instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to remove obstructions to intersfate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized."

It was further said:

> "The provisions of the 1947 act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. . . . The employer as well as the union is now required by the 1947 act to proceed before the board to obtain appropriate relief from unfair labor practices [fol. 54] affecting interstate commerce. The alleged cause for injunctive relief presents matters for the board to determine in the first instance pursuant to the exercise of power vested by the National Labor Relations Act as amended by the 1947 act. There is nothing in the act as so amended which indicates that these

unions may not thus be subject to the appropriate procedure thereby provided."

In In re DeSilva, 33 Cal. 2d 76 [199 P. 2d 6], an employer had secured an injunction on the ground that the picketing was unlawful under the Labor Management Relations Act, 1947, since there had been no certification of a union representative. It was there held that the injunction issued was void, its object being to accomplish something which was within the exclusive jurisdiction of the National Labor Relations Board under the terms of the federal act. In commenting on the Gerry case, supra, the court said:

> "This court there held that the declared intent and purpose of the Labor Management Relations Act, 1947, was to vest exclusive jurisdiction in the National Labor Relations Board over unfair Labor practices affecting interstate commerce and to vest in the courts generally jurisdiction only of action for damages arising out of the commission of such practices, and that the act deprived the superior courts of original equitable jurisdiction in such cases."

The case of Sommer v. Metal Trades Council, 40 Cal. 2d 392, [254 P. 2d 539], involved a claimed violation of the [fol. 55] jurisdictional Strike Act, (Lab. Code, sec. 115 et seq.) and the same union activity was declared to be an unfair labor practice by the National Labor Relations Act, as amended. The question there was whether the state court had jurisdiction to enforce the provisions of the state statute making the defined union jurisdictional activity unlawful and subject to restraint. It was held that the trial court did not abuse its discretion in granting an injunction order pending a trial on the merits. The court discussed the Gerry case, supra, and observed that there the petitioners contended that the state had concurrent jurisdiction with the National Labor Relations Board to enforce the provisions of the federal act and that the decision rejecting this contention was a determination that in the absence of a valid, applicable local statute affording relief, facts which amount to unfair labor practices under the federal act are cognizable exclusively in a proceeding before the National

Board. After discussing several United States Supreme Court cases on the subject, the court said:

> "It is thus apparent that the factors of protection and condemnation under the federal act largely determine whether the area is one closed to state control. The decisions indicate that the presence of those factors are deemed to disclose an intention on the part of Congress to place exclusive jurisdiction in the National Board."

In the instant case plaintiffs pleaded and the court found that they were engaged in interstate commerce. The claimed objectionable conduct of the unions is defined in the federal [fol. 56] act as an unfair labor practice but there is no state statute making it unlawful as was the case in Sommer v. Metal Trades Council, supra. We therefore conclude that the state court in the instant action had no jurisdiction to grant the permanent injunction herein.

It is argued that although the federal law is applicable, the National Labor Relations Board has, as a matter of policy, declined to accept jurisdiction and that there can be no conflict of remedies between the courts and the board. However, the evidence shows that on May 7, 1953, plaintiffs' counsel mailed to the National Labor Relations Board a petition by the Valley Lumber Company for determination of representation of its lumber yard and delivery workers. This petition was apparently dismissed by the regional director for the reason that the scope of the business involved did not justify further proceedings. The petition contained no application to the National Board to take jurisdiction of an unfair labor practice charge and the evidence fails to show a refusal of the board to assume jurisdiction of the acts and conduct of the unions involved in that connection. Since the National Labor Relations Board had jurisdiction to determine plaintiffs' right to injunctive relief herein, the state court was without jurisdiction until plaintiffs exhausted their administrative remedy. (United States v. Superior Court, 19 Cal. 2d 189, 195; Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 292; Woodward v. Broadway Fed. S. & L. Assn., 111 Cal. App.

2d 218, 220; Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41; 82 L. Ed. 638.)

[fol. 57] Respondents argue that the federal law does not prevent a state court from awarding damages for a violation of a state public policy which does not conflict with the federal law; that the remedy in the instant case is for intentional, unexcused injury to the business of another and that the injury herein is unexcused because for an unlawful purpose, namely, to compel the execution of a contract in violation of the National Labor Relations Act.

In United Const. Workers, Etc. v. Laburnum Const. Corp., supra, the court held that the Labor Management Act of 1947 (National Labor Relations Act, sec. 10 (c), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. sec. 160 (c); Labor Management Relations Act of 1947, sec. 303 (b), 29 U.S.C.A. sec. 187 (b)), did not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of common law court actions for damages as would preclude an appropriate state court from hearing and determining its issues even though such conduct constitutes unfair labor practice under that act; that Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. However, in this state peaceful picketing is a lawful form of concerted action by members of the labor union. (Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 382, [106 P. 2d 403].) As was said in Seven Up Etc. Co. v. Grocery Etc. Union, 40 Cal. 2d 368, 374: "Peaceful picketing has been identified [fol. 58] with freedom of speech—a means by which the pickets communicate to others the existence of a labor controversy." (Citing many cases.) In Park & T. I. Corp. v. Int. Etc. of Teamsters, 27 Cal. 2d 599, 603, the court said:

> "'In this state 'a union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor' but 'the object of concerted labor activity must be proper and . . . must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief.' (James v. Marinship Corp., 25 Cal. 2d

721, 728, 729 [155 P. 2d 329], and authorities there cited.)"

In McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal. 2d 311, 319, the court said:

"Concerning the means used, it must be taken as settled in this state, that workmen may associate together and exert various forms of economic pressure upon employers, provided they act peaceably and honestly. The conventional means of exerting this economic pressure which have been held lawful are the strike . . . the boycott, both primary and secondary . . . and the picket . . ."

In Fortenbury v. Superior Court, 16 Cal. 2d 405, 410, it is held that the law does not invariably give relief against damage, because in some circumstances the infliction of damage, though intentional, is without legal remedy. "So far as cases of picketing or boycott are concerned, there is [fol. 59] no remedy for damage which may be inflicted where, as here, the means are peaceful and the purpose is reasonably related to working conditions or the right to bargain collectively."

In Bautista v. Jones, 25 Cal. 2d 746, 755, Mr. Justice Edmonds, in his concurring opinion, states:

"And in the excercise of its constitutional right of free speech, a union is pr-vileged intentionally to induce others, in their relation with an employer, to apply economic pressure upon him resulting in injury. However, this privilege to interfere with a competitor's valuable and legally protected economic interests is not an absolute one, but is qualified and conditional.

"The first limitation which has been applied by this court is that a union, in compelling compliance with its demands through the application of economic pressure, induced by publication of the facts and solicitation of support, is privileged to invade the interests of others only where it employs peaceful and truthful means. (Citing cases.) The second general condition necessary to justify the invasion of economic interest is that the end be lawful. 'Any injury to a lawful business . . . is

prima facie actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare.' (J. F. Parkinson Co. v. Building Trades Council, supra.)"

In the instant case the attempt by the unions to induce plaintiffs to sign the contract involved is not made unlawful by statute in this state. The means used were peaceful [fol. 60] and the purpose is reasonably related to working conditions and the right to bargain collectively. Damages, if any, suffered by plaintiffs were occasioned by the presence of a picket near plaintiffs' place of business, carrying a banner inviting plaintiffs' employees to join the union and not by the alleged purpose of the picketing. Moreover, the award of damages in the sum of $1,000 was apparently based on the testimony of one Glenn Bailey that he had once purchased materials from the plaintiffs but that he had overheard a conversation between a union representative and the witness contractor in which they were discussing the picketing of plaintiffs' place of business; that he had intended to buy his materials on a new job from plaintiffs but had changed his mind; that the approximate cost of materials on the new job was $4,000. The award of $1,000 damages was not supported by substantial evidence that it was caused by the tortious conduct of defendants or any of them.

The attempted appeal from the order overruling the demurrer herein is dismissed as such an order is not appealable. (Garroway v. Jennings, 180 Cal. 97; Southern Cal. Tel. Co. v. Damenstein, 81 Cal. App. 2d 216; Cook v. Stewart McKee & Co., 68 Cal. App. 2d 758.)

Judgment reversed.

Mussell, J.

I concur:

Barnard, P. J.

[fol. 61] Order Due Oct. 23, 1954

L.A. 23005

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

GARMON et al.,

v.

SAN DIEGO BUILDING TRADES COUNCIL et al.

ORDER GRANTING HEARING

AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

Respondents' petition for hearing granted and cause transferred to this court.

Gibson, Chief Justice, Shenk, Justice, Edmonds, Justice, Carter, Justice, Traynor, Justice, Schauer, Justice, Spence, Justice.

Filed Oct. 20, 1954, William I. Sullivan, Clerk, by J. M. Rogers, B. F. Deputy.

[fols. 62-63] IN THE SUPREME COURT OF CALIFORNIA

OPINION—December 2, 1955

J. S. GARMON et al., Respondents,

v.

SAN DIEGO BUILDING TRADES COUNCIL et al., Appellants.

[On hearing after decision by the District Court of Appeal, Fourth Appellate District, Civ. No. 4854 (127 A.C.A. 320, 273 P.2d 686), reversing judgment of the superior court. Judgment affirmed.]

[fol. 64] Appeal from a judgment of the Superior Court of San Diego County. John A. Hewicker, Judge. Affirmed.

Action against unions to enjoin picketing and to recover damages. Judgment for plaintiffs affirmed.

Todd & Todd, Thomas Whelan, John T. Holt and Clarence E. Todd for Appellants.

Gray, Cary, Ames & Frye, James W. Archer and Ward W. Waddell, Jr., for Respondents.

EDMONDS, J.—The Garmons, while engaged in business as partners under the name of Valley Lumber Company, became involved in a dispute with union labor organizations. [fol. 65] The appeal is from a judgment which enjoins the unions and their members from carrying on certain activities and awards damages in the amount of $1,000 against them.

Following a trial, the court made these findings of fact:

Valley Lumber Company is engaged in the business of selling lumber and building materials, and its operations affect interstate commerce. In the previous year it sold materials originating and manufactured out of California of a value exceeding $250,000. None of its employees belong to any of the defendant unions and none have designated either of them as a labor representative. The employees have indicated that they do not desire to join, or be represented by, a union. The National Labor Relations Board has not certified either of the unions as the representative of the employees and the company has not recognized any union as such.

The union demanded a labor agreement containing a clause which would require the company to employ, and continue in employment, only such persons as are, or immediately become, members of the defendant unions.[1] The company refused to execute the agreement, upon the grounds that it would be a violation of the National Labor

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[1] "Pursuant to the terms of Section 8(a)(3) of the Labor Management Relations Act, 1947, there shall be no limitation of the Employer as to whom he shall employ, continue in employment, or discharge, except that every employee listed under Section III, (A) and (B), hereof, not otherwise excluded, shall be, or shall make application within thirty (30) days, become and remain a member in good standing of Millmen's Union, Local 2020, of the United Brotherhood of Carpenters and Joiners of America, or Building Material and Dump Truck Drivers, Local 36."

Relations Act to do so before the employees, or an appropriate unit thereof, designated a union as its collective bargaining agent. Shortly thereafter, the unions placed pickets at the company's place of business.

The intent of the unions was not to induce the employees to join one of them, nor to provide education or information as to the benefits of unionization. The only purpose was to force the company to execute the agreement or suffer destruction of its business. In addition to picketing, union agents followed the company's trucks and threatened persons about to enter its place of business with economic injury. By this conduct, and the use of language calculated to instill fear of such injury, the unions induced building contractors to discontinue their patronage of the company, with consequent damage to the business amounting to $1,000.

The National Labor Relations Board, "... pursuant to a policy declared by it, refused to take jurisdiction of the controversy between plaintiffs and defendants for the pur-
[fol. 66] pose of determining whether defendants should be designated as the collective bargaining representative of the employees of plaintiffs."

Upon these findings a judgment was entered which awards the company $1,000 damages and enjoins the unions "... from picketing the places of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, express or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof."

The unions contend that jurisdiction of the controversy

is exclusively in the National Labor Relations Board. They also attack the judgment upon the ground that the company did not exhaust its administrative remedies. Other points presented are: the evidence does not support the findings; the findings do not include all issues tendered; the award of damages is based upon evidence entirely speculative; and, the record shows no violation of any state law.

In support of the judgment, the company asserts that the jurisdiction of the national board is not exclusive, or if it is, the state court may enjoin unlawful conduct when the board has declined to act. Another point relied upon is that, regardless of state jurisdiction to enjoin the unions, the superior court's award of damages for violation of the state's public policy is not contrary to any federal law.

[1] The National Labor Relations Board has exclusive primary jurisdiction to prevent unlawful demands. (*Weber* v. *Anheuser-Busch, Inc.* —— U.S. —— [—— S. Ct. ——, *99 L.Ed. ——]; *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485 [74 S.Ct. 161, 98 L.Ed. 228]; *United Const. Workers* v. *Laburnum Const. Corp.*, 347 U.S. 656 [74 S.Ct. 833, 98 L.Ed. 1025]; *Bethlehem Steel* v. *New York State Labor Relations Board*, 330 U.S. 767, 769 [fol. 67] [67 S. Ct. 1026, 91 L.Ed. 1234].) [2a] The purpose of the picketing was to compel the company to sign an agreement which included a clause requiring the employer to encourage membership in the unions. In the circumstances here shown, under the Labor Management Relations Act, this was an unfair labor practice.[2]

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*L.Ed.Adv.Opn.: 99 L.Ed. 386.

[2](a) "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

(b) "It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organiza-

In the Garner case, a Pennsylvania court enjoined picketing which, contrary to a state statute, was being carried on for the purpose of coercing an employer to compel or "influence" employees to join the union. The state Supreme Court reversed the judgment upon the ground that the employer's sole remedy was that provided by the National Labor Management Relations Act. (*Garner* v. *Teamsters*, 373 Pa. 19 [94 A.2d 893].) The United States Supreme Court agreed, holding "that petitioner's grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices. . . ."

[3] However, the board need not accept every controversy of which it has jurisdiction. (*Haleston Drug Stores* v. *National Labor Relations Board*, 187 F.2d 418. See discussion by Philip Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Labor Law Journal 114.) It hears and determines controversies only in connection with "enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." (National Board Press release dated October 6, 1950.)

In the present case, the employer's position is that, when the National Labor Relations Board refuses to take jurisdiction of a dispute because the effect of the company's business on interstate commerce is not substantial, the state courts may act. The United States Supreme Court has not decided this question. In the Garner case it pointed to the lack of any indication that "the federal Board would decline to exercise its powers once its jurisdiction was invoked." (*Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485 [74 S.Ct. 161 at 164, 98 L.Ed. 228].) Later in *Building Trades Council* v. *Kinard Const. Co.*, 346 [fol. 68] U.S. 933 [74 S.Ct. 373, 98 L.Ed 423], in reversing a state court's affirmance of an injunction on the authority of the Garner case, it said: "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be

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tion has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." (29 U.S.C. § 158.)

futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction.

[4] The reason for prohibiting state courts from acting in cases in which the board has jurisdiction is to obtain uniform application of the substantive rules as expressed by Congress, and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. (*Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485 [74 S.Ct. 161, 166, 98 L.Ed. 228].) [5] A remedy under federal laws available to an injured party may justify preemption of the field of labor relations, but when the application of that rule would result in the loss of all protection, there is no reason to bar state courts from providing relief. [6] There is no conflict of jurisdiction when the federal board determines not to adjudicate the issues. [7] Furthermore, a refusal to accept jurisdiction upon the ground that the issue presented does not sufficiently affect the national welfare to justify the board's attention, in effect, is a declaration that the national labor policy will not be jeopardized if the state assumes jurisdiction.

[8] When Congress enacted the applicable statutes, it must have been aware that an unfair labor practice may affect management and labor in a small business to the same extent as in a large industry. The difference is only the effect on the national labor and economic level. Certainly Congress did not intend to deprive a business having only a limited effect on interstate commerce of all protection in a labor-management controversy. By giving the board discretion to accept or refuse jurisdiction, the legislative purpose must have been to give the state courts jurisdiction when the board specifically determines that the controversy will not affect the national economy. (Accord: *Your Food Stores* v. *Retail Clerks' Local No. 1564*, 124 F.Supp. 697, 703; *Truck Drivers, Chauffeurs, W. & Helpers Local No. 941* v. *Whitfield Transportation, Inc.*, —— Tex. —— [273 S.W.2d 857, 860]; But *cf.*: *New York State Labor Relations Board* v. *Wags Transp. System*, 130 N.Y.S.2d 731; *Universal Car & Service Co.* v. *International Assn. of Machinists*, 27 C.C.H. Labor Law Reporter 68, 825.)

In the present case, the employer filed a petition for [fol. 69] determination of representation, pursuant to the provisions of the National Labor Relations Act. It was informed by letter that "The amount of business done by Valley Lumber Company in interstate commerce is insufficient for the Board to assert jurisdiction on the basis of previous Board decisions." Later, after a cafeful investigation, the regional director of the board dismissed the petition. He stated that "in view of the scope of the business operation involved, it would not effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time. . . ." It appears without conflict that only $250,000 of the company's business during the preceding year was in interstate commerce, either directly or indirectly. In view of the general pronouncement by the board (Press Releases dated October 6, 1950 and July 14, 1954) that it will exercise jurisdiction only when an "enterprise" has a direct inflow of material valued at $500,000 a year, or an indirect flow valued at $1,000,000, a request for review of the Regional Director's action would have been futile.

[9] The general policy of the board in regard to jurisdiction makes no distinction between an application to determine representation and one complaining of an unfair labor practice. A refusal to take jurisdiction of a controversy concerning representation constitutes a refusal to accept jurisdiction of a complaint against that employer which charges an unfair labor practice. In C. A. Braukman, etc. and International Union of Operating Engineers, 94 N.L.R.B. 234, the board said, "True, the Board has not heretofore considered the instant complaint case. However, because the Board does not, with respect to the question of jurisdiction, differentiate between representation and complaint cases, we believe that dismissal of the . . . representation case on jurisdictional grounds . . . was in effect, notice to all parties concerned that any complaint case based on alleged unfair labor practices . . . would similarly be dismissed." (Also see: *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141.)

[10] Section 10(a) of the Taft-Hartley Act (29 U.S.C. § 160(a)), gives the board the power to prevent any person

from engaging in an unfair labor practice when it affects interstate commerce. That section also empowers the board, by agreement, to cede jurisdiction of cases affecting such commerce to state agencies so long as the state law is not inconsistent with the national labor policy as expressed in the federal laws. But Congress has not prohibited the state from assuming jurisdiction of conduct which would amount [fol. 70] to an unfair labor practice under the federal law when the board refuses to take jurisdiction. When jurisdiction is declined by the board, the legislative mandate that nothing shall affect the board's power to enforce the act is not infringed upon.

[11] The basis for refusing to allow a state court to take jurisdiction of a dispute within the cognizance of the board *in advance* of action by it is the purpose to avoid a possible conflict between state policy and that of the board in an area in which the federal body has not had an opportunity to act. "Coincidence" of policy, the United States Supreme Court has declared, is not sufficient to avoid the danger of a possible conflict. (*Bethlehem Steel* v. *New York State Labor Relations Board*, 330 U.S. 767, 769 [67 S.Ct. 1026, 91 L.Ed. 1234].) However, if the state court should refuse to assume jurisdiction when the board has affirmatively declined to act, one party to the labor controversy might be able to flout the policy expressed by Congress in the national legislation.

[12] The unions complain of the court's asserted failure to make a finding on their allegation that there was no unfair labor practice because, as clearly stated, the contract was not to be signed, and if signed, would not be accepted by the union unless the employees became members of it. But the findings that the unions presented the agreement to the company with a demand for its signature, followed by picketing and other activity with the purpose to compel the employer to execute the agreement although it would be illegal to do so, was a determination against the unions upon this defense.

The company argues that the trial court properly gave both damages and injunctive relief. It relies upon the rule stated in *James* v. *Marinship Corp.*, 25 Cal.2d 721 [155 P.2d 329, 160 A.L.R. 900], that "the object of concerted labor

activity must be proper and that it must be sought by lawful means, otherwise the persons injured may obtain damages or injunctive relief." (P. 728.) They assert that damages were a proper redress for the injuries previously suffered from the picketing and concerted activities by defendants and an injunction is proper to avoid further injury. The appellants take the position that "the conduct of the labor union was lawful and proper in the light of both federal and state law."

[13] One argument is that since the ultimate objective of the concerted economic pressure was to obtain a closed shop, which is a proper labor objective under the law of California (*McKay* v. *Retail Auto Salesmen's Local Union No. 1067*, 16 Cal.2d 311, 327 [106 P.2d 373]; *Shafer* v. *Reg-*[fol. 71] *istered Pharmacists Union Local 1172*, 16 Cal.2d 379, 387-388 [106 P.2d 403]), the purpose of the picketing was not "unlawful" and hence not within the rule of the Marinship case. For this proposition, reliance is placed upon *Park & Tilford I. Corp.* v. *International etc. of Teamsters*, 27 Cal.2d 599 [165 P.2d 891, 162 A.L.R. 1426].

The Park & Tilford case concerned an injunction which, a majority of the court concluded, was broader than that allowed by the pleadings and the evidence. There, without having obtained the requisite majority of employees for the purposes of collective bargaining, a labor organization picketed and boycotted the employer after demanding of him that he sign a closed shop agreement with that organization. An injunction was granted restraining the union from all interference with the sale or delivery of the plaintiff's products and from all picketing and boycotting of its business. This relief was too broad, said a majority of the court, although the trial judge was correct in the conclusion that the demands made by the union were unlawful under the National Labor Relations Act.

The evidence as to the union's conduct, said the court, did not support the finding that the purpose of the concerted economic pressure was to compel the employer to violate the federal law by discriminating as to his employee's choice of union representation. Instead, it was held, the ultimate purpose of the economic pressure was to bring about a closed shop agreement, which would be lawful

under both California law and the controlling federal statutes. The court further held that, although the federal act made unlawful the employer's signing of such an agreement before a requisite majority of his employees was obtained by the union, the statute did not proscribe the assertion of economic pressure by the unions upon both him and his employees, to compel their accession to union demands, before the time at which the employer might lawfully comply with them. This construction of the federal act was based, in part, upon an analogy made to the Shafer and McKay cases, *supra*, in which quite similar provisions in sections 921-923 of the California Labor Code were construed as protecting employees from improper employer influence but not as protecting the employer from economic pressure designed to bring about a closed shop agreement.

Since those decisions, however, the federal statute has been broadened to extend protection to the employer from such activities. (29 U.S.C. § 158(b)(2).) [2b] The assertion [fol. 72] of economic pressure to compel an employer to sign the type of agreement here involved is an unfair labor practice under section 8(b)(2) of the act. (*Cf. Great Atlantic & Pacific Tea Co.* (1949) 81 N.L.R.B. 1052.) Concerted labor activities for such a purpose thus were unlawful under the federal statute, and for that reason were not privileged under the California law. (*Cf. Park & Tilford I. Corp.* v. *International etc. of Teamsters*, 27 Cal.2d 599, 604 [165 P.2d 891, 162 A.L.R. 1426]; *Lillefloren* v. *Superior Court*, 31 Cal.2d 439, 440 [189 P.2d 265].)

[14] It is argued, however, that the purpose of the concerted activities here complained of was to invite the employees to join the union. But the court found that the purpose of the picketing was not to induce the employees to join the unions but to compel the company to sign the proffered agreement or suffer destruction of its business. To hold that a contrary objective was intended would require this court to draw different inferences from the evidence which amply supports the finding of the trial court.

[15] Finally, it is argued that the evidence does not support the finding as to the amount of damages. However, there is testimony that the employer, as a result of the picketing, was required to pick up and deliver its products at

different yards, incurring the expense of additional man hours and trucking facilities. The record also shows that at least one prospective purchaser was induced to purchase materials at another yard because of the union activities, resulting in the loss of profits at least as great as the amount of damages awarded. This evidence amply supports the judgment insofar as damages are concerned.

The judgment is affirmed.

Shenk, J., Schauer, J., and Spence, J., concurred.

CARTER, J.—I dissent.

'In this case defendant unions were enjoined from peaceful picketing to organize plaintiffs' employees, have them join defendants and have defendants as their bargaining representatives; damages were also awarded to plaintiffs for the picketing. The trial court found that plaintiffs' business affected interstate commerce. Plaintiffs requested the National Labor Relations Board to hold an election to determine who should represent their employees. The board dismissed the proceeding. The majority opinion holds that the case is one in which the board would normally have jurisdiction and the state court would not, because defend-[fol. 73] ants' activity was an unfair labor practice under the National Labor Management Relations Act (29 U.S.C.A. § 151 et seq.)* but, says the majority, in this case the state court has jurisdiction because the board refused to take jurisdiction by dismissing the representation proceedings and that federal law (Labor Management Relations Act) rather than state law is applicable; that under the federal law defendants' conduct being an unfair labor practice, the picketing was for an unlawful purpose. Hence defendants were properly enjoined and damages awarded against

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*That is clearly the law. (*Weber* v. *Anheuser-Busch, Inc.*, —— U.S. —— [75 S.Ct. 480, †99 L.Ed. ——]; *Garner* v. *Teamsters, Chauffeurs, & Helpers Union No. 776*, 346 U.S. 485 [74 S.Ct. 161, 98 L.Ed. 228]; *United Const. Workers* v. *Laburnum Const. Corp.*, 347 U.S. 656 [74 S.Ct. 833, 98 L.Ed. 1025]; *Building Trades Council* v. *Kinard Const. Co.*, 346 U.S. 933 [74 S.Ct. 373, 98 L.Ed. 423].)

†L.Ed.Adv.Opn.: Page 386.

them. In other words, the state court is to enforce the federal law.

Those conclusions are fallacious for the following reasons: (1) The national board and the powers granted to it are an integral part of the federal law and that law is not intended to have application in a situation where the board plays no part; it is inescapable that the federal law is to be administered by the board, not by the state courts. (2) The board in refusing jurisdiction as it has power to do, has in effect determined that the federal law should not apply in this case. (3) It is neither feasible nor fair to apply the federal law. (4) There has not been such a refusal to exercise jurisdiction by the board here as to justify the conclusion that the state court has jurisdiction.

Before discussing those points it should be observed that under our law defendants' activity is lawful and hence neither damages nor injunctive relief is proper. The majority does not question this proposition. The rule was stated with the citation of many supporting authorities in *Park & Tilford I. Corp.* v. *International etc. of Teamsters,* 27 Cal.2d 599, 604 [165 P.2d 891, 162 A.L.R. 1426]: "The closed shop is recognized as a proper objective of concerted labor activities, even when undertaken by a union that represents none of the employees of the employer against whom the activities are directed. (*McKay* v. *Retail etc. Union No. 1067,* 16 Cal.2d 311, 319, 322 [106 P.2d 373]; *Shafer* v. *Registered Pharmacists Union,* 16 Cal.2d 379, 382 [106 P.2d 403]; *C. S. Smith Met. Market Co.* v. *Lyons,* 16 Cal.2d 389 [106 P.2d 414]; *Sontag Chain Stores Co.* v. *Superior Court,* 18 Cal.2d 92 [113 P.2d 689]; see *Fortenbury* v. *Superior* [fol. 74] *Court,* 16 Cal.2d 405 [106 P.2d 411]; *Steiner* v. *Long Beach Local No. 128,* 19 Cal.2d 676, 682 [123 P.2d 20]; *Emde* v. *San Joanquin County etc. Council,* 23 Cal.2d 146, 155 [143 P.2d 20, 150 A.L.R. 916]; *Lisse* v. *Local Union,* 2 Cal.2d 312 [41 P.2d 314]; *In re Lyons,* 27 Cal.App.2d 293 [81 P.2d 190]; *J. F. Parkinson Co.* v. *Building Trades Council,* 154 Cal. 581 [98 P. 1027, 16 Ann. Cas. 1165, 21 L.R.A.N.S. 550]; *Pierce* v. *Stablemen's Union,* 156 Cal. 70 [103 P. 324].) . . . A union may picket and boycott an employer's business with the object of so discouraging public support of the business that the nonunion workers will face the prospect of the loss of their jobs. . . .

"Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business. (See *C. S. Smith Met. Market Co.* v. *Lyons*, 16 Cal.2d 389, 398 [106 P.2d 414].) 'The law . . . permits workers to organize and use their combined power in the market, thus restoring, it is thought, the equality of bargaining power upon which the benefits of competition and free enterprise rest. Accordingly, the propriety of the object of workers' concerted activity does not depend upon a judicial determination of its fairness as between workers and employers.' (4 Rest. Torts, p. 118.) . . .

"[I]n *Shafer* v. *Registered Pharmacists Union, supra*, the court stated: 'The argument is . . . made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right "to coerce" the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain "unorganized," and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights. (*Senn* v. *Tile Layers' Union*, 301 U.S. 468 [57 S.Ct. 857, 81 L.Ed. 1229]; *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323 [58 S.Ct. 578, 82 L.Ed. 372]; *Fur Workers' Union No. 72* v. *Fur Workers' Union No. 21238* (1940), 105 F.2d 1, aff'd 308 U.S. 522 [60 S.Ct. 292, 84 L.Ed. 443].)"

[fol. 75] Speaking to the first point, it is clear that the national board and not a state court is to administer the federal law, at least in situations involving unfair labor practices. It is the forum which is to decide what steps, if any, should be taken to interpret initially the law, to make rules and regulations amplifying the law, to decide what is

be t for interstate commerce when activity in a labor controversy is claimed to interfere with it, to maintain uniformity in the treatment of cases, etc. The stated purpose of the federal law is to preserve certain rights and protect commerce (29 U.S.C.A. § 151.) The national board is created and it must report to Congress on the cases it has heard. (*Id.*, § 153.) It may make rules and regulations to carry out the act. (*Id.* § 156.) Unfair labor practices are defined. (*Id.* § 158.) The board "shall decide" ". . . whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of sections 151-166 of this title, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected." (*Id.*, § 159.) The board ". . . is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this sub-chapter." (*Id.*, § 160.) If it is charged that an unfair labor practice is being committed the board "may" issue a complaint and shall decide the matter; it "may" ask a *federal* court for equitable relief in enforcing its decision, and its decision may be reviewed by a *federal* court. (*Id.*, § 160.) Immunity from prosecution is accorded witnesses who are compelled to

[fol. 76] testify before the board. (*Id.*, § 161.) These and many other provisions clearly envision that the federal law is not to operate without the national board. That proposition was pointed out in *Garner* v. *Teamsters, Chauffeurs, & Helpers, Local Union No. 776*, 346 U.S. 485, 488 [74 S.Ct. 161, 98 L.Ed. 228]: "Congress has taken in hand this particular type of controversy where it affects interstate commerce. . . . [I]t has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. . . .

"*Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.* Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal board, precludes state courts from doing so. . . . And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal board also exclude state courts from like

action." (Emphasis added.) And it is said in *Textile Workers Union of America* v. *Arista Mills Co.*, 193 F.2d 529, 533: "'It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that act was "to establish a single paramount administrative or quasi-judicial authority [fol. 77] in connection with the development of federal American law regarding collective bargaining"; that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined.'" It should be clear, therefore, that the Labor Management Relations Act in dealing with unfair labor practices can only be enforced by the intervention of the national board, and that state courts are not in a position to apply that law.

In regard to the second point it is settled that the national board may refuse jurisdiction because interstate commerce is not sufficiently affected. "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that *the policies of the Act would not be effectuated* by its assertion of jurisdiction in that case." (Emphasis added; *National Labor Relations Board* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684 [71 S.Ct. 943, 95 L.Ed. 1284]; see also *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F.2d 418, cert. den., 342 U.S. 815 [72 S.Ct. 29, 96 L.Ed. 616]; *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, 205 F.2d 931; *National Labor Relations Board* v. *Stoller*, 207 F.2d 305; *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F.2d 141; note, 98 L.Ed. 221.) That power necessarily includes the power to determine that the federal law shall not apply in a particular case. When it refuses to take jurisdiction in a particular case because commerce is not affected and the "*purposes* of the Act will not *be effectuated*" by assertion of jurisdiction it has said that the case is not one for the application of the federal law and the state court should not override that decision as it has done in this case. It is true that the board is given

power to cede jurisdiction to a state agency by agreement with such agency over any cases in any industry even though such cases may involve labor disputes affecting interstate commerce *unless*, however, the state's applicable "statute" is "inconsistent" with the federal act. (29 U.S.C.A. § 160(a).) There has been no cession here,* but the cession provision indicates that in such cases the state is in effect applying federal law because there can be no cession unless the federal and state law are consistent in both wording and interpretation. It thus may be inferred [fol. 78] that the states are to apply the federal law only in the situation where the cession requirements are met. In other situations it is to apply its own law. When we come to the power of the federal board to refuse jurisdiction, as distinguished from cession, we find that power is to make such refusal because the *board finds* or states "that the *policies of the Act* would not be effectuated by" the board's assertion of jurisdiction (emphasis added). (See *National Labor Relations Board* v. *Denver Bldg. & Const. Trades Council, supra*, 341 U.S. 675, 684; and cases cited *supra*, together with the statement in the decision by the regional director in this particular case as to why jurisdiction was refused.) In other words, the board has the power under its authority to refuse jurisdiction—to decide that the "policies" declared by the provisions of the federal act, shall not apply in a particular case. The board having made that determination, it follows that the state court should not apply the federal act where the board has refused to act. Implicit also in the power of refusal is the board's conclusion that there is no need for uniformity of decision in order that businesses and labor in interstate commerce will be similarly treated. Moreover the board having exclusive jurisdiction generally, it also has exclusive jurisdiction to determine that interstate commerce is not sufficiently affected for the federal law to operate. The state court thus has no jurisdiction to decide to the contrary.

Thirdly, it is neither feasible nor fair to apply the federal law in this case. We have no agency such as a labor relations board in this state or anything like it. There are no facilities

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*We have neither statute nor agency covering the field.

for conducting representation elections to determine whether a union shall be the collective bargaining agent for the employees, a question which may be basic in passing upon unfair labor practice charges. We have no body with the facilities nor expertness in the field. Our courts are at a disadvantage in sizing up the national picture—the impact upon interstate commerce—in deciding such controversies. The courts cannot make rules and regulations on the subject as may the national board. They cannot achieve the uniformity that is vital under the federal law, not having available to them, as does the national board, the nationwide circumstances.

The discrimination which results from the majority holding is manifest. An employer, although engaged in business affecting interstate commerce, yet not enough in the board's view to justify taking jurisdiction and applying the federal law, is essentially a local operator and such business should have applied to it the state law the same as its competitors whose business is purely intrastate. There is no rational basis for discriminating between the two classes of business [fol. 79] or the employees or unions concerned. Neither has any meaningful impact on interstate commerce and thus both should be amenable to the same law—the state law governing intrastate commerce—employer-employee-union relations.

In the foregoing discussion it has been assumed that there was a refusal by the national board to take jurisdiction of the case and that such refusal is ground for saying the state court has jurisdiction. The latter question has not been settled by the United States Supreme Court. In *Garner* v. *Teamsters, Chauffeurs, & Helpers Union No. 776, supra,* 346 U.S. 485, 488, the court held, as above indicated, that the board had exclusive jurisdiction but in discussing the question, mentioned that "Nor is there any suggestion that respondents' plea of federal jurisdiction and preemption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked." In the later case of *Building Trades Council* v. *Kinard Const. Co., supra,* 346 U.S. 933, the court reversed (in a memorandum opinion) the state court's (Supreme Court of Alabama) affirmance of an injunction

on the basis of the Garner case and in so doing stated: "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction." It was pointed out in the decision by the Alabama Supreme Court (*Kinard Const. Co.* v. *Building Trades Council, supra,* [258 Ala. 500] 64 So.2d 400, 402) that the board had made the general criteria statement, the same as it did here, as to the cases in which it would take jurisdiction. I interpret the Kinard case as holding, therefore, that such a general pronouncement as that made by the board here is not sufficient to show that the board would refuse to exercise jurisdiction. We have, therefore, the first question as to whether there has been a sufficient showing of refusal to exercise jurisdiction in this case, assuming such refusal would leave the matter open to state action. It would appear that there is not sufficient showing of refusal here. Although the regional director mentioned the scope of plaintiffs' business, it may well have been that his investigation revealed the facts as found by the court, that none of plaintiffs' employees desired representation by the unions and hence an election would be futile. Also the director said that no action would be taken at "this time" implying that a change of conditions might bring a different result or that [fol. 80] the charge of an unfair labor practice, a condition the court here found to exist, might result in board action. While it may have been that because of the smallness of the business here involved a representation election would not be ordered by the board and for the same reason a complaint for unfair labor practices would not be considered, it would appear that an effort should be made to have the board take jurisdiction of the precise question involved in the state court action, rather than the side issue of representation, before it may be said the board has refused to assume jurisdiction. That precise question is whether there has been an unfair labor practice for which a remedy may be obtained. We said in *In re De Silva,* 33 Cal.2d 76, 78 [199 P.2d 6]: "No distinction may be made here because

the National Labor Relations Board had denied the company's petition for certification of a union representative. By the denial the board did not divest itself of jurisdiction to determine whether the defendants were committing unfair labor practices affecting interstate commerce which should be enjoined pursuant to the procedure provided by the act. Its exclusive jurisdiction over that matter had not been invoked by the plaintiffs."

Furthermore, there is also an insufficiency of a showing that the board would not act, in that, as pointed out by the regional director, plaintiffs could have appealed the dismissal of their representation petition to the national board in Washington, D. C. This they did not do. The dismissal may have been reversed. "There is no doubt that the administrative remedy is not exhausted where a party fails to appeal from an administrative decision to a higher tribunal within the administrative machinery, or, having filed an appeal, fails to await a determination thereon before his resort to the courts." (42 Am.Jur., Public Administrative Law, § 202; see *Woodward* v. *Broadway Fed. Sav. & Loan Assn.*, 111 Cal.App.2d 218 [244 P.2d 467]; 2 Cal.Jur.2d, Administrative Law, § 187.) It is suggested, however, that an appeal would consume an amount of time that would render any remedy from the board ineffective, and that the criteria statement of the board above quoted indicates an appeal would be futile. Neither point has merit.

The delay is one of the incidents of the procedure before the board established by Congress to handle certain labor controversies. In a situation in which it was held that a federal court would not enjoin a state court from giving relief in a case under the Labor Management Relations Act and the union had to follow the state action through the state appellate procedure and then apply to the Supreme Court, [fol. 81] the court stated in regard to the delay caused by following the state appellate procedure, "Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them. To permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established. A district court's assertion of equity power

or its denial may in turn give rise to appellate review on this collateral issue. There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties." (*Amalgamated Clothing Workers* v. *Richman Brothers*, —— U.S. —— [75 S.Ct. 452, 457, *99 L.Ed. ——].

The statement of criteria is no more reason to declare that an appeal to the board would be futile than that it makes an application to the regional director unnecessary. The same reasons, that is, that there should be a final determination by the director and board before it can be said the board has refused to exercise its jurisdiction, apply to the necessity for an appeal. The board as such has not acted until an appeal is taken and determined. The essence of state jurisdiction if the board refuses to act is an unequivocal final determination by the board that it will not act. Indeed, the board may on appeal determine that a representation election, the only thing asked by plaintiffs, is not appropriate because none of their employees belong or desire to join the union rather than that the policies of the federal law will not be effectuated by taking jurisdiction. As heretofore pointed out, the United States Supreme Court has in effect held that a general criteria statement is not enough to amount to a refusal by the board to take jurisdiction. (*Building Trades Council* v. *Kinard Const. Co.*, *supra*, 346 U.S. 933.)

In the foregoing discussion I have assumed that the majority adheres to the state law as stated in *Park & Tilford I. Corp.* v. *International etc. of Teamsters*, quoted *supra*, 27 Cal.2d 599, and the many cases there cited, and I trust there is no thought of overruling those cases without saying so although it applies the federal law by using the ritual of unlawful purpose.† However, it is not clearly pointed out that under our law the purpose of the picketing here in-

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*L.Ed.Adv.Opn.: Page 422.

†Picketing for an unlawful purpose may be enjoined under state law; the purpose here is unlawful under the federal law, and hence enjoinable, but is lawful under state law and therefore not enjoinable.

[fol. 82] volved is not unlawful or that the court is applying the federal law only because interstate commerce is affected.

The judgment should be reversed.

Gibson, C. J., and Traynor, J., concurred.

[fol. 83] Order Due December 31, 1955

L.A. No. 23005

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

GARMON et al.,

v.

SAN DIEGO BUILDING TRADES COUNCIL, et al.

ORDER DENYING REHEARING

Filed Dec. 28 1955, William I. Sullivan, Clerk, By J. Rogers, S.F. Deputy

Appellants' petition for rehearing denied.

Gibson, C.J., Carter, J. and Traynor, J. are of the opinion that the petition should be granted.

Gibson, Chief Justice

[fol. 84] SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 785

SAN DIEGO BUILDING TRADES COUNCIL et al., Petitioners

vs.

J. S. GARMON et al.

ORDER ALLOWING CERTIORARI. Filed May 7, 1956

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted, and the case is transferred to the summary calendar. The Solicitor

General is invited to file a brief in this case on behalf of the National Labor Relations Board.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. A] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

Dept. No. 1

BEFORE HON. JOHN A. HEWICKER, JUDGE

No. 180903

J. S. GARMON, J. M. GARMON and W. A. GARMON, Plaintiffs,

vs.

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL #2020, BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL #36, JOHN DOES I TO X INCLUSIVE, Defendants.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiffs: Gray, Cary, Ames & Frye, 1410 Bank of America Bldg., San Diego 1, California, Telephone: Franklin 7323. By: James Archer, Esq.

For the Defendants: Thomas Whelan, Esq., 524 San Diego Trust & Svgs. Bldg., San Diego 1, California, Telephone: Franklin 9-1688, and Holt and Macomber, 1114 San Diego Trust & Svgs. Bldg., San Diego 1, California, Telephone: Franklin 9-9408, By: John T. Holt, Esq., and Todd and Todd, 625 Market Street, San Francisco, California, Telephone: Douglas 2-7025, By: Clarence E. Todd, Esq.

[fol.1] *San Diego, California, Monday, June 1, 1953, 10:00 A. M.*

The Court: Garmon against San Diego Building Trades Council.

Mr. Acher: Ready for the plaintiffs, your Honor.

Mr. Holt: Ready for the defendants.

The Court: Have you been able to stipulate to any of the facts?

STIPULATIONS OF COUNSEL

Mr. Archer: We have not been able to stipulate to much. We have stipulated to the allegations of Paragraph 1 of the complaint.

The Court: How about Paragraph 2?

Mr. Archer: 2?

Mr. Holt: We stipulated——

Mr. Archer: Counsel informed me——

The Court: How about 3?

Mr. Holt: It says plaintiffs are ignorant of something and we will stipulate to that.

Mr. Archer: 3 is immaterial at this time, at least. 4 will require proof. 5 will require proof; 6, 7 and 8, they will stipulate that they did place pickets around the premises of the Valley Lumber Company commencing on April 28, 1953.

Mr. Holt: May we have it, Jim, until May 8, at which time the restraining order was issued by the Court that the picketing then ceased until May 19th, when the restraining [fol. 2] order was changed and Judge Turrentine permitted us to picket further. We want it to be clarified that we had not violated the Court order.

Mr. Archer: So stipulated.

Mr. Holt: Will you stipulate we may now introduce in evidence the sign he carried and will you stipulate that this is the sign and the wording thereon is the only wording that was presented on the sign by the picket?

Mr. Todd: That is the picket banner.

Mr. Archer: We will so stipulate.

Mr. Holt: May we show it to your Honor and have it marked as Exhibit 1 for the defendants?

The Court: Defendants' A.

Mr. Holt: And if I may read it into the record, "A. F. of L.

Picket, Millmen's Union, Number 2020, Teamsters' Union, No. 36, invites employees to join."

Mr. Archer: The balance of the allegations will have to be proved, your Honor.

The Court: Very well. Do you wish to make an opening statement?

Opening Statement by Mr. Archer

Mr. Archer: Very, very briefly, your Honor. With the exception of the fact that we do not have a unionized department comparable to the Roofers' Department in the Benton Paint Company case, the two cases are identical. The union representatives demanded that the employers here sign a contract, which if they had signed it would [fol. 3] have—and enforced, it would have put the employers in violation of the Labor Management Act of 1947, the same as in the Benton Paint Company case. The management here permitted the union representatives to meet with the men to see if the men wanted to join the union, the same as in the Benton Paint Company case, the men decided they did not want to join the union, that it wasn't advantageous to them, and so informed the representatives of the union involved and the employers and the unions—or, rather, the unions persisted in demanding that the employer sign a contract in spite of that fact. The employer refused and the picketing commenced. As a part of the picketing, deliveries to the lumber yard were stopped in many instances, transferred in others. The delivery trucks of the lumber company were followed to various jobs, contractors refused to purchase materials from the lumber yard. There has been some demonstratable damage suffered by the business, which we will develop.

As I have indicated, there is no distinction, as far as I can see, between the case of the Benton Company and this one, except that we are not complicated by the Roofers' Department going on strike.

Opening Statement by Mr. Holt

Mr. Holt: I dislike working Sundays, but I broke the rule. We have got together so we can streamline this case and hear it before your Honor as quickly as possible. I

should like to make a short opening statement to clarify the facts. When he speaks of another case, it is not helpful to [fol. 4] me. I will say to your Honor that the evidence will, if permitted, show that heretofore, in the northern part of the County, the defendant labor unions have met at various times with the employers and have discussed with them contracts involving labor unions and in those instances have explained to the employers, which the plaintiff here knew at all times, that the union would sign no contract in any event until the employees had signed up with the union and the union was their representative between them, but the union was concurrently advising both with the employees and the employers so everybody would know what was going on.

The evidence will show that on March 26, after numerous conferences with the plaintiffs, the defendants went to the plaintiffs' place of business and had called together, with the consent of the plaintiffs, the employees of the company, and the labor union representatives talked with the employees and explained the contracts to them, went over the items with them, and the men agreed that they did want such a contract if the employers would sign the same, with the exception of one man, a foreman, who wanted a little more money. And the employees told the parties, our parties, that that was fine. That is what they wanted and they went back to the plaintiff, to Mr. Bill Garmon, and explained it to him and he knew that the employees had agreed that we represent them, but he stalled for time, and that was all right with our people, too, because Mr. Bill Garmon [fol. 5] and some of the defendants have been on the most friendly terms and when the picketing started here, they were on the most friendly terms as can be in a struggle of this sort.

Our people did not demand they sign a contract whether they represented the employees or not, and have never done so. The plaintiffs have been explained to that the employees must consent, that they must sign up with the union before the employers can sign.

After some delay, when our people went back to the plaintiffs, the thing happened that so oftentimes happens, the employers had seen to it by then that their employees had changed their minds, and we were informed by the

Garmons that the employees had taken a vote since the last meeting and were against being unionized.

We then started to picket in the manner hereinbefore stated. The only violence in the case is from the plaintiff. Things have been thrown at our men, marbles have been thrown, oranges, a truck came on the wrong side of the street and nearly ran over a picket. There has been no violence on the part of our people at all.

To streamline this thing so that there is no long argument before your Honor—it is not necessary before courts of certain capacity—however, we feel this, that we would like to save great multitudinous objections, and to make an objection to the introduction of evidence in the case on the [fol. 6] ground that the Court would have no jurisdiction to hear the matter, if they are in interstate commerce, as they say in their complaint, that is what they state, so we should like then to present merely the authorities to your Honor, just the headings, and it won't take over ten or fifteen minutes at the most, on that field alone, and we will just give you the citations.

Then there is a series of citations we would like to give you that if they are not in interstate commerce we have a right to peacefully picket, and we would like to give you those citations. Mr. Todd will do that. We have this thing cut down so within fifteen minutes that might be presented to you. The issues will be clear then and that case can be quickly tried. Would your Honor entertain such a motion at this time, to exclude the evidence so we can clarify the issues?

The Court: Go ahead.

Mr. Holt: We thought it would be better than making objection after objection. Mr. Todd.

Opening Statement by Mr. Todd

Mr. Todd: May it please the Court, I feel very keenly that the Court has no jurisdiction in this case, that the complaint does not state a cause of action. The Court has no jurisdiction if we are proceeding under State law because under the State authorities your Honor couldn't issue the judgment, couldn't enter the judgment which they demand. The only judgment you could properly enter would be a judgment of dismissal.

[fol. 7] As Mr. Holt said, I am going to merely refer to the authorities, except that I would like to read about a dozen lines from two decisions so recent that they are not even in the printed and bound reports, on the subject of picketing and the attitude of the Courts of California toward picketing.

There is an idea there has been some rescission in the minds of our higher courts and picketing is not favored now as it was in the past.

First is Haggerty versus County of Kings, 117 Advanced California Appellate, 574, at page 582, where the District Court of Appeals for this Fourth District, set aside a County Ordinance of the County of Kings which prohibited picketing and used this language at page 582:

"The right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such, is guaranteed by the Constitution as an incident of free speech."

Citing such cases as Hughes vs. Superior Court and in re Blaney: "The identification of the Constitutional protection of the right of free speech, press and assembly, with the publicizing of labor disputes or problems through the medium of picketing, boycotting and otherwise, has been established."

Then I would like to read the language of the Supreme Court in the unanimous decision of the Seven-Up Bottling Company versus Grocery Drivers' Union, handed down on [fol. 8] March 10, 1953, reported in 40 Advance California, 373, and I would like to read a few words from page 378 and 9:

"Peaceful picketing has been identified with freedom of speech—a means by which the pickets communicate to others the existence of a labor controversy." Then follows half a page of citations. Then it is said on page 379: "And it appears to be settled that injunctive relief against picketing is available where the object sought to be achieved or the means used to achieve it are unlawful."

That is a very familiar principle of law and in the Seven-Up case the picketing was restrained because it was in

violation of the state statutes. However, the Supreme Court goes on to say in this decision:

"The solution of labor problems requires, however, an approach with a broader perspective. Although literally, and in a strict sense, the objective or means employed in the union activity may be unlawful, there still remains the necessity for preserving the general public welfare and the Constitutional guarantees of freedom of speech, press and assembly. The asserted illegality may be merely incidental or of only minor importance when weighed against the requirement of competition and some measure of equality in the economic struggle between the seller and the purchaser of services. The public interest may tip the scales one way or the other. If preventive relief were available in every [fol. 9] instance of labor activity interfering with the performance by a common carrier or other public utility of its duties, or involving some unlawful act, no matter how insignificant on the part of the person upon whom the economic pressure is exerted, conceivably there would be little left in the way of protection for the exercise of the fundamental rights of freedom of speech, press and assembly, and organized labor would be at a serious if not hopeless disadvantage in our competitive economy."

Now I will just refer to the other authorities with the exact page where the citation occurs. I will mention first the Fortenbury case, 16 Cal. 2nd, 407-09, which is a case involving a secondary boycott. In that case the Supreme Court annulled a contempt citation on the ground that the Court had no jurisdiction to enter the judgment restraining the picketing under a secondary boycott. That is directly in point.

Now the Abelleira case, 17 Cal. 2nd, 280, is a case which holds that while a court may have jurisdiction of the parties and jurisdiction in a general way of the subject matter, it occurs in many cases, as we contend here, that the court has no jurisdiction to enter any judgment excepting a judgment of dismissal. The demand for a closed shop contract is lawful.

Shafer versus Registered Pharmacists Union, 16 Cal. 2nd, 381. C. S. Smith Metropolitan Market versus Lyons, [fol. 10] 16 Cal 2nd, at page 391. Chrisman against Culi-

nary Workers' Local, 46 Cal. App. 2nd, 129 at page 131. In re Blaney, 30 California 2nd, 643 at 644.

Now the second point, the picketing was lawful. Haggerty against Kings County, which I just read, and the Seven-Up case, which I just read. In re Lyons, another famous leading decision by the District Court of Appeals for the Fourth District, 27 California Appellate 2nd, 293 at 293 and 299. McKay versus Retail Auto Salesman, 16 California 2nd, 311 at 319. So far the demand is shown to be lawful by these leading cases, none of which have been reversed or questioned, and also the picketing.

Now the secondary boycott. The old Parkinson case is still the law, 154 California, 581 at 609 and 612. The Blaney case, 30 California 2nd, at 646. The McKay case, 16 California 2nd, at 319. Pierce versus Stablemen's Union, 156 California, 70, 75 and 77. There the Supreme Court of California held there was no difference in the mind of the Court between a primary and secondary boycott, both being lawful. Emde versus Milk Wagon Drivers, 23 California 2nd, 146 at 155. And then the Fortenbury case which I have already mentioned, 16 Cal. 2nd 311—no, 16 Cal. 2nd, at 405 and 408.

The damage to the plaintiff supports no cause of action if the picketing and boycott were lawful. Emde versus Milk Wagon Drivers, 23 California 2nd, at 155. The Smith [fol. 11] Market case, 16 California 2nd, 398, 399.

Now, that is all under the assumption that the plaintiff is seeking relief under the laws of California in this Superior Court of the State of California. Now, if he is seeking relief under the Federal Act, under the Taft-Hartley, then he is in the wrong court. He is in the wrong tribunal. Gerry of California, 32 California, 2nd, 119 at 121, 122 and 129, and other authorities. There is a whole sheaf of federal authorities that I could cite, but Gerry of California is the decision of our own Supreme Court, so I will just withhold other authorities along that line.

Then there is another decision, if your Honor please, which is also so recent that it is not yet in the official reports and I would like to read just briefly from that decision. That is the case of Capitol Service versus the Labor Relations Board, a decision of what used to be the Circuit Court of Appeals—it is now called the United States Court of Appeals for the Ninth Circuit. The decision was handed down

May 12, 1953, two weeks ago. That was a decision after a re-hearing. That was a case like this where a Superior Court, in this case for the County of Los Angeles, issued an injunction against a secondary boycott. The National Labor Relations Board filed a suit against the Superior Court of Los Angeles County for an injunction against the enforcement of an injunction against the secondary boycott. [fol. 12] The District Court granted the injunction against the Superior Court prohibiting enforcement of it. An appeal was taken to the Court of Appeals for the Ninth Circuit and the decision was affirmed. That was sometime in January. Then a re-hearing was asked for and in view, I suppose, of the importance of the issue, the re-hearing was granted and this decision to which I refer is the decision, unanimous decision, of the Circuit Court for the Ninth Circuit, again upholding the injunction.

Now I would like to read just a few lines. John, can you see that his Honor has a copy of this decision?

Mr. Archer: I will be glad to give him a copy. I have two of them.

Mr. Todd: Very well. Thank you very much. The decision is not a lengthy one and I think your Honor would find it more satisfactory to read it through rather than have me to give the citations from it. There are many decisions of the United States Supreme Court holding that the jurisdiction lies—the jurisdiction over an unfair labor practice, which was what this picketing and boycotting would be if it existed, and if the federal law were invoked, and that the only tribunal which has jurisdiction is the Federal Tribunals, particularly the National Labor Relations Board.

Now the final point, which is that assuming that this Court should have jurisdiction, just assuming for the sake of argument this Court should have jurisdiction to [fol. 13] enforce the Federal Act and to enjoin these unfair labor practices, the plaintiff has not exhausted his remedies. His remedy is the administrative remedy provided for before the National Labor Relations Board and until he has exhausted that remedy he has no standing in any court. The authorities are Gerry of California versus Superior Court, 32 California 2nd, 119, 121, 122 and 129.

The Capitol Service case, which Mr. Archer just handed to your Honor, pages 4 and 5 and page 9. The Abelleira

case, which I mentioned, 17 California 2nd, 280 at 291, which discusses at great length the rule in California, and, as a matter of fact, it is a universal rule, so far as I know, that where there is an administrative remedy the plaintiff must show that he has exhausted that remedy before he is permitted to appear in any court. The latest case on this subject is the Woodard case—I haven't the citation. No, Woodard versus Broadway Federal Savings and Loan Association, and that is 111 California Appellate 2nd, 218, a very valuable case which holds that the plaintiff in an action where there is an administrative remedy available must not only show that he has invoked that remedy but that he has exhausted the remedy, that he has gone all through the steps necessary to exhaust that remedy before he be heard in any civil court. Those are merely the highlights and I would be very glad indeed to present to your Honor a much more extended [fol. 14] argument, either in writing or orally, but that is just the outline of our position. Thank you.

Mr. Archer: May I make a brief reply, your Honor?

The Court: Go ahead.

Mr. Archer: One thing I neglected to tell your Honor in my opening statement was that we are again in the same position exactly as we were in the Benton Paint Company case in that we have again sought relief from the National Labor Relations Board and we will offer in evidence the correspondence with the Board. Ironically enough, it was in this morning's mail, handed me before coming to court, that we again have received from the National Labor Relations Board, the Regional Director's Office, a rejection of our petition that they do anything to relieve us in this situation. So again we find ourselves in that same position. The same argument has been made by Mr. Todd as was made in this same courtroom before, which Judge Mouser, I believe his name is pronounced, from Imperial County sitting——

The Court: Mouser.

Mr. Archer: Mouser. Sitting for your Honor here.

Mr. Todd: Isn't it Mousart, your Honor?

OPENING STATEMENT BY MR. ARCHER

Mr. Archer: No. We had the same argument you have made here. He overruled the demurrers and motions to

strike and held this court had jurisdiction. Subsequently your Honor will well recall throughout the Benton case the same arguments were made to your Honor and overruled then. The same argument as has heretofore been made was [fol. 15] made to Judge Turrentine in this same case and overruled by him after carefully considering it and the authorities that were submitted to him, by way of letters, which are contained in the file——

Mr. Holt: He permitted us to picket, did he not?

Mr. Archer: Yes, through a mistake or misunderstanding of that phase of the law which was not argued to him.

Mr. Whelan: He misunderstood the other phase of the law which was not argued.

Mr. Archer: The jurisdiction question was the sole thing he permitted argument on and he ruled against the unions on that and we did not discuss at that time before Judge Turrentine the question of whether or not they have the right to peacefully picket for an unlawful purpose, which is what our contention is here and again, I say, identically the same situation as we had in the Benton case. Mr. Todd read one excerpt from the Haggerty case in 117 A. C. A. He read under the headnote 5 about it being one of the union's Constitutional rights as an incident of free speech to picket, however, he omitted to read the very next sentence which says:

"However, such identification does not free the concerted activity of picketing from all restraint and injunctive relief is available where the object sought to be achieved and the means used to achieve it are unlawful."

Your Honor will note that the cases cited on this [fol. 16] peaceful picketing subject were the Fortenbury, Shafer and Lyons cases in 16 California 2nd, a case in 46 California Appellate 2nd, the Parkinson case in 154 California, the McKay case in 16 California 2nd, a case in 156 California and the Emde case in 23 California 2nd.

I think your Honor is familiar with the line of cases which have been decided in March of this year by the Supreme Court of California, including the Seven-Up case and in that case, reported at 40 Advance California Reports, 373, Mr. Todd appeared as counsel. In that case the trial court—Judge Archie Mitchell being one of two, and Clarence M.

Hanson, Judge Mitchell sitting by assignment of the Judicial Council in Los Angeles County, there they made an objection to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action and in an opinion, oddly enough, written by Justice Carter, a unanimous decision, they reversed and sent the case back and held it was error to have granted that objection. The Court in that case on page 379 said this:

"And it appears to be settled that injunctive relief against picketing is available where the object sought to be achieved or the means used to achieve it are unlawful."

In that case Justice Carter reviews those cases which we reviewed and discussed at length in the Benton [fol. 17] case, your Honor. Those were the Hughes, the Hanke case in the state of Washington, the Giboney case which we discussed at length in the Schweizer case, and generally reviews all these newer cases in the Supreme Court of the United States, also the Gazzen case, which came down contemporaneously with the Hanke. Judge Carter is also, no, I believe it is in one of the following cases, the Sommer case in which the court there distinguishes the case of Gerry of California and also in re De Soto. In the Sommer case, 40 A. C., 397, another case in which Mr. Todd appeared as counsel, made the same contention about the National Labor Relations Board having sole jurisdiction. The Supreme Court of California had this to say:

"It may also be assumed that the evidence which was relevant in the representation contest and to the several charges of unfair labor practices before the National Board bears on the issues here. But it does not follow that the State Court does not have jurisdiction of this controversy."

And while it involves there a violation of a State Statute, there can be no distinction between it involving any other violation of law as to jurisdiction.

Now, with respect to this Capitol Service case, that is in its advanced opinion form. In that case Capitol Service sought National Labor Relations Board relief and they—the Board there took jurisdiction and on page 3 of that opinion it is interesting to note that the National [fol. 18] Labor Relations Board took jurisdiction of the

case under these brief facts: "The findings of fact by the Court below show that during 1951 Service made purchases totaling approximately $500,000. Of this amount, $30,000 was received directly from sources outside California and $175,000 was received indirectly from such sources. See Wickard against Filburn, infra, on indirect effect on interstate commerce. Thus, if Service were to be put out of business, approximately $205,000 worth of goods would cease flowing in interstate commerce. This is a substantial amount and not so slight as to bring into play the maxim of de minimis. See N.L.R.B. against Fainblatt, in the Supreme Court of the United States; Santa Cruz Company against N.L.R.B.; and N.L.R.B. against Townsend. Nor does it matter that Service is essentially a local business, supplying bakery goods for stores in the Los Angeles area. In Wickard vs. Filburn, the Court stated: 'But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'.' Thus it is the factor of substantial economic effect upon interstate commerce and not the nature of the business that determines federal jurisdiction. As has [fol. 19] been shown, there is such substantial economic effect present here."

There the National Labor Relations Board's only showing as to volume of business chose to accept jurisdiction and enjoined the unions from picketing. Nevertheless, the employer, for reasons best known to him, and not disclosed by the record, went into the Los Angeles Superior Court and obtained an injunction from Judge Swan so that they had two injunctions, and it was at that point the National Labor Relations Board brought this proceeding to enjoin the prosecution of the State Injunction and, as Judge Turrentine pointed out in his ruling on this same argument heretofore, he found that to be the distinguishing factor, although the National Labor Relations Board did take jurisdiction of this Danish-Maid case in Los Angeles, Capitol Service, on that showing of volume of business. They have declined twice now to take jurisdiction or even look at similar con-

troversies 125 miles away. Whether they lack the manpower or, as presently constituted, the inclination, to go beyond their own back yard we can only speculate.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Let me ask Mr. Holt a question. Mr. Holt, in these cases I have had, the National Labor Relations Board has declined to do anything and where does that leave the employer?

Mr. Holt: It leaves him immediately under the McKay [fol. 20] case, under the Smith case and other cases in intrastate business.

The Court: What relief has he got?

Mr. Holt: He has no relief because he is not entitled to any relief. The economic struggle can go on under the Constitution, by peaceful picketing under the McKay case and other cases, and the Court states that even though they might destroy the business, and in one of the cases they had to close the doors, the Court said that is part of the economic struggle.

The Court: I don't agree with that theory.

Mr. Holt: How can we convince your Honor? The law says that is the theory.

Mr. Archer: Lots has happened since the McKay case.

The Court: I think if the National Labor Relations Board won't take jurisdiction, that a man is entitled to some relief some place along the line.

Mr. Holt: Under all circumstances—It will save your time if we have not the right to peacefully picket.

The Court: I don't say that. But as far as the National Labor Relations Board turning these folks down, I want to see and hear what this is all about.

Mr. Holt: Of course. But we have made our position clear. That is our belief and I presume——

Mr. Todd: If I could have about sixty seconds in rebuttal to Mr. Archer I would like to read, or rather point [fol. 21] out that in each of those jurisdictional strike cases the Supreme Court held they had a right to enforce the statute of California. They didn't purport to enforce any statute of the United States in any one of those three cases. In the Seven-Up case at page 373:

"In view of the result reached herein it will be necessary to consider only the Jurisdictional Strike Law. There is no allegation showing that plaintiff was engaged in a business affecting interstate commerce and hence the Labor Management Relations Act of 1947 has no application."

In the Sommers case at page 401 the question is whether or not the State Court has jurisdiction to enforce the provisions of a State Statute, not a Federal Statute. Counsel mentioned several decisions of the Supreme Court of the United States where picketing was restrained for an unlawful purpose. There are several others he didn't mention and in every one of them there is involved the violation of a State Statute. There is no question of any violation of the policy of the State of California because, as Mr. Holt has stated to your Honor, that is in favor of the right of peaceful picketing and peaceful boycotting, both primary and secondary. So there is no semblance of an unlawful purpose in connection with this picketing under the State Law of California.

The Court: I might say, Mr. Holt, in the Schweizer case I had Mr. Richman from Los Angeles, he was down here [fol. 22] and I inquired of him—that was a restaurant case—I inquired of him if I ran my own restaurant and they struck me and I couldn't get supplies and all the grocery stores were organized and under union jurisdiction and I went in and the clerks wouldn't serve me, and if my friends went in to buy groceries for me and if they were asked who it was for and they told them it was for me, and they refused to sell the food, the result would be they could legally starve me to death. Mr. Richman says there is nothing I could do about it. He thinks they could legally starve me to death. I don't think that is the law.

Mr. Holt: I think that would be—that would be for an illegal purpose. That would be in contemplation to kill one. It would be a statute of the State——

The Court: No, they just refused me because I didn't belong to the union, and I couldn't eat or buy food. I told Mr. Richman at the time I didn't think that was the law and I wouldn't approve that method. I will overrule the objection and we will proceed with the case.

Mr. Holt: Just so that you will keep an open mind for us, we aren't really going to starve you to death.

Mr. Archer: I doubt if you could, Counsel.

Mr. Whelan: May I ask a couple of questions? Number one is does your Honor and does Counsel make any distinction between a petition filed with the National Labor Relations Board for an election for the purpose of de-
[fol. 23] termining a bargaining agent and a complaint filed with the National Labor Relations Board complaining of an unfair labor practice? That is number one. Question number two is, and this is for the benefit of Mr. Todd and Mr. Holt who didn't happen to have the good fortune to be in the Benton case, and that is this: Is the unlawful act complained of against the unions in this case a violation of Section 158, Title 29B, Subsection 2, which says, "It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of Subsection A, Section 3, of this section, or to discriminate against an employee with respect to whom membership in such organization had been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership". Is that the unlawful act?

Mr. Archer: I had hoped we would have that clear. The unlawful act that we complain of is that if we accede to the demand to sign a contract compelling our employees to join a union where they do not want to and we thereafter would adhere to the contract that we signed with the unions, then we would be in violation of the law. The signing of the contract per se is not the unlawful act we are talking about. It puts us in the position that either we violate the contract with the union in not complying with the
[fol. 24] contract we have signed or if we made them join the union then we are in violation of the law.

Mr. Whelan: Which particular Section?

Mr. Archer: 138, Section 3.

Mr. Holt: We may save some time here, maybe this whole lawsuit. May I inquire of counsel—this would be the heart of it, anyway. Will counsel concede that we have the right to peacefully picket the plaintiffs' place of business where the employees are to publicize a request to have the employees join us?

Mr. Archer: No, sir.

Mr. Holt: That is what you are going to have to decide, whether we have that basic right.

Mr. Archer: Because that is not why you are picketing.

Mr. Holt: Well, if we picket for that purpose do you concede we have that right?

Mr. Archer: I am not going to get in any argument about that because it is an interpretation that will be placed on the evidence. We know why you are picketing.

Mr. Holt: I take it you grant we do have that right?

Mr. Archer: No, I do not.

Mr. Whelan: Mr. Archer, did you say the act complained of is a violation of Section 158B, Subsection 3?

Mr. Archer: 158, Section 3. I beg your pardon. Wait a minute. Let me look and see if I have got the last amendment.

[fol. 25] Mr. Todd: Is that the Section cited in the Capitol Service case?

Mr. Archer: You are right. 158 A, 3, under the '47 Amendment. That is right.

Mr. Whelan: 158 A, 3.

Mr. Archer: Yes. I did not get an opportunity to call your Honor's attention to the very short statement made at the end of the Capitol Service case by the Judge.

The Court: I thought I would try to read it. You may mention it.

Mr. Archer: He points up the very problem that is now before us.

The Court: I will overrule the objection as to the jurisdiction of the court and we will proceed with the trial. We will take a fifteen minute recess.

(Recess.)

The Court: You may proceed. Call your first witness.

Mr. Archer: Mr. Garmon, will you take the stand?

Mr. Holt: Which Garmon is that?

Mr. Archer: William A. Garmon.

Mr. Todd: Which Mr. Garmon is that?

The Witness: William A.

The Court: You may move that microphone up to you if you think it is necessary.

[fol. 26] WILLIAM A. GARMON, a plaintiff herein, called as a witness for and in his own behalf, and being first duly sworn, testifies as follows:

Direct examination.

By Mr. Archer:

Q. Please state your full name?
A. William A. Garmon.
Q. Where do you reside, Mr. Garmon?
A. In Escondido, California.
Q. Do you have a brother and a nephew doing business as the Valley Lumber Company?
A. Yes, sir.
Q. Will you state the name of your brother?
A. J. S. Garmon.
Q. And the name of your nephew?
A. Max G.
Q. The three of you constitute the partners of the Valley Lumber Company?
A. Yes.
Q. Where is it located?
A. 144 East Grant Street, in Escondido.
Q. Do you also have a yard in Borrego?
A. Yes, sir.
Q. Will you describe to the Court the general nature of your operation, please?
A. Well, we have these two retail yards where we [fol. 27] retail lumber, sash and doors, and all kinds of hardware and steel, and which is trucked in there by truck, that is, part of it is, and we deliver lumber with our trucks to various jobs over our community and it is a general retail store, that is, lumber yard.
Q. Do you do any mill work?
A. No mill work.
Q. How many employees do you employ?
A. We have eight.
Q. Can you tell us the classification of those employees?
A. Well, we have two men that we classify as truck drivers and the other boys, they unload lumber out of cars, they stack lumber in the yard, they help load the trucks,

we have orders to go out for delivery, and just general work. Quite a bit of it is just common labor.

Q. During the year immediately preceding the occurrences which are the subject of this suit, what was the volume of your gross sales?

A. For the year, you mean?

Q. Yes.

A. It was over half a million dollars.

Q. Of those goods how much originated from out of the State of California?

A. About two hundred thousand.

Q. Has your company, or your employees, to put it [fol. 28] more accurately, ever been unionized?

A. Never.

Q. Have your men ever requested a union?

A. No, sir.

Q. Describe when and how you were first approached by the defendant unions, the Millmen's Union and the Dump Truck Drivers' Union?

A. Well, I would say two or three years ago Mr. Taylor, with the union, called on us and asked us to become a member and I told him that I didn't want to sign any contract at that time and he probably made two or three trips, maybe six or seven months apart; then approximately November of '52, Mr. Collins called on us a number of times and wanted us to sign a contract with the union. And I explained to him I did not care to sign a contract at that time.

Q. Let me interrupt you for a moment and I will ask you if this mimeographed contract is a copy of the contract that Mr. Collins presented to you in or about November, 1952?

A. Yes.

Mr. Archer: We will offer it in evidence, your Honor, as Plaintiffs' 1.

The Court: Have you seen it?

Mr. Todd: May we see it, please?

Mr. Archer: I thought you, of course, had copies.

[fol. 29] Mr. Holt: Subject to an examination, let's go ahead.

Mr. Archer: Very well. We will offer it as Plaintiffs' Exhibit 1, your Honor.

The Court: May be received as Plaintiffs' Exhibit 1.

By Mr. Archer:

Q. Did you refuse to sign the contract?

Mr. Whelan: That is objected to as leading and suggestive. I have not objected heretofore because they were all preliminary matters, but this, I think is leading.

By Mr. Archer:

Q. Did you sign a contract like Plaintiffs' Exhibit 1?
A. No, we did not.
Q. Why?
A. We just didn't care to sign it. We had no request from our men to sign any contract.

Mr. Whelan: Move to strike that on the grounds it is a voluntary statement and not responsive to any question.
The Court: Overruled. He was asked why.
Mr. Holt: Would you give it to me, please?

(The record read by the reporter.)

By Mr. Archer:

Q. How does the wage scale that you pay your employees compare with the wage scale in that contract?
A. Just about the same. Very little difference in it.
Q. Are there any other variations as to benefits which [fol. 30] you grant your men?
A. Yes, there is. In that contract it calls that the men, after being with us five years, they get two weeks vacation, I believe. We are giving our men two weeks vacation after they have been with us one year. And if they are sick for three or four days, their pay continues. If they want off a day to transact any business, their pay continues. We do not deduct them for a few days off.
Q. Was that provided for in that contract?
A. No, sir.
Q. After you refused to sign the contract for the reasons you have indicated, what happened?
A. Well, Mr. Collins, he called on us a number of times and wanted to know if we were ready to sign the contract and I told him no, and I believe about the last time that I talked to Mr. Collins I brought him into my office and sat

down and talked with him and I says, "I don't even know whether my men want to become union members," and I said, "I will be pleased to take you out in our yard on my time and you talk with them and see if they want to become union members," which he did. They talked, I imagine, for half an hour or an hour and he returned, Mr. Collins did, returned back to my office and he said that the men seemed to be interested to some extent, so my yard foreman, who I asked to get the men together there for him to talk to, he came in the office shortly after and I asked——
[fol. 31] Mr. Whelan: Was this in the presence of Mr. Collins?

The Court: Was Collins there?

A. Yes.

Mr. Whelan: When the yard foreman came in?

A. Yes.

By Mr. Archer:

Q. What happened then, Mr. Garmon?

A. I asked Mr. Collins—I forget who was with him—to excuse me to speak to my yard foreman about what their decision was in becoming a member and he says——

Mr. Holt: May I make an objection?

Mr. Whelan: This is Collins talking?

The Court: Is this Collins?

A. No.

The Court: Well, that is hearsay.

By Mr. Archer:

Q. You can only relate the conversation you had with Mr. Rutledge—for the record, I will ask if it was Mr. Rutledge, your yard foreman, that you were referring to?

A. Yes.

Q. You can only relate conversations you had with Mr. Rutledge on this subject that were had in the presence of Mr. Collins and whoever the other unidentified party was.

A. Mr. Collins wasn't with me at that time.

Q. Then after you had talked with Mr. Rutledge did you again then talk to Mr. Collins?

[fol. 32] A. Yes.

Q. What was said in that conversation?

A. I told him that he would have to return some other date to talk with me further on it, that the boys had not decided to sign up.

Q. Then what happened?

A. Well, I think that evening I was called out of town and I was gone for a few days.

Q. And after you came back, or can you fix the time about when you came back?

A. Oh, I would say it was sometime in March, I believe, or thereabouts.

Q. Tell us what happened after you came back?

A. Well, our men told me that they had——

Mr. Whelan: That is objected to as hearsay, if the Court please; no foundation laid.

The Court: I will sustain the objection. You can't tell us what your men told you.

By Mr. Archer:

Q. Did you have any further conversation with any representatives of the union after you came back?

A. Yes.

Q. Tell us about those.

A. Well, one of the executives, I guess you might call them that, he lives in Vista, he called on me once or twice and wanted to know if we were ready to sign up the [fol. 33] contract. I told him I wasn't.

Q. Did you tell him why you were not?

A. Yeah.

Q. What did you tell him?

A. I told him that our men, as far I knew, were perfectly satisfied as they are and I saw no advantage in us signing a contract. I had had no request of them to sign one.

Q. Do you recall any other conversations that you may have had with any union representatives after you came back from your business trip?

A. Yes, I talked with Mr. Taylor, "Spud" Taylor.

Q. About when was that?

A. Well, that was sometime in April. I don't remember the date.

Q. And what was said at that time?

A. Well, Mr. Taylor came in and wanted to know if we were ready to sign up their contract with them and I told him no and he says, "Well, we are just going to have to do this the hard way". I told him, "You will just have to do it. We are not willing to sign any contract and if that is the way you want to do it, you will just have to do it the hard way." So he left and he says, "I will see you with a picket tomorrow morning."

Q. Did you have a picket or pickets the next morning?

[fol. 34] A. Yes.

Q. Will you tell us, Mr. Garmon, what, if any, effect various seasons have on your business, or if your business is what is commonly known as a seasonal business?

A. Well, the early spring and summer is our best business months.

Q. After the picket or pickets were placed on your business what effect did that have?

A. Well, it has had the effect that trucks, that is, freight line trucks won't come in with our freight and it has caused some contractors and some union members to stay away from our yard in crossing the picket line. It has caused us quite a bit of inconvenience of having to run all over town to pick up our merchandise that has to be left here and there.

Mr. Whelan: Move to strike that as a conclusion and opinion of the witness.

The Court: Overruled.

By Mr. Archer:

Q. Have there been any regular substantial customers who have ceased doing business with you?

Mr. Whelan: That is objected to as leading and suggestive, if the Court please.

The Court: Overruled.

By Mr. Archer:

Q. Do you have my question in mind?

[fol. 35] A. Yes. I would say we had some customers that has quit trading with us on the strength of that picket.

Mr. Whelan: I move to strike "on the strength of" as a conclusion and opinion.

The Court: May be stricken.

A. The customers will not, that is, some of our customers——

Mr. Whelan: That is a conclusion and opinion. I move to strike it, if the Court please.

The Court: Overruled.

A. The customers will not cross the line to buy our merchandise.

By Mr. Archer:

Q. What have you done with respect to picking up your merchandise?

A. Well, we have been forced to have this merchandise left at various places.

Mr. Whelan: Move to strike that as a conclusion and opinion, that they have been forced to do it.

The Court: Overruled.

A. Then in turn we would have to send our truck and men to these places and pick it up and bring it to our yard.

By Mr. Archer:

Q. In addition to the pickets has there been an [fol. 36] automobile or automobiles parked out in front of your place with representatives of the unions in them?

A. Yes.

Q. What do they do in those automobiles?

A. Some of them have followed our trucks to various jobs.

Mr. Whelan: For the sake of the record I move to strike that on the grounds it is the conclusion and opinion and not a statement of fact and no foundation.

The Court: Overruled.

By Mr. Archer:

Q. Can you identify any of the men who have been in those automobiles following your trucks?

Mr. Whelan: That is leading and suggestive and no foundation laid, calls for a conclusion and opinion.

The Court: Overruled. He is asking whether he can identify them.

A. Yes, I can.

By Mr. Archer:

Q. Who are some of those men?

A. I don't know whether I know them by name or not, but one of the—two of the gentlemen are sitting back there now (indicating).

Q. Where are they sitting? What row?

A. The man there in the back row there back of "Spud" Taylor is one, and I believe——

[fol. 37] Mr. Archer: Could you give us his name, Mr. Holt?

Mr. Whelan: That is John Carlin, I think, that he has identified.

Mr. Archer: How do you spell that?

Mr. Whelan: C-a-r-l-i-n (spelling).

A. And Mr. Collins has followed our trucks some. That is the only ones I know.

By Mr. Archer:

Q. You haven't seen any other. What have you observed with respect to trucks coming to your place of business to make deliveries?

Mr. Whelan: Just a minute. May I have that question, please?

A. They——

Mr. Whelan: Pardon me.

(The record read by the reporter.)

A. They refused to cross the picket line.

By Mr. Archer:

Q. Have you ever seen the picket stop a truck or trucks?
A. Yes.
Q. Can you identify any of the trucks that have been stopped by the picket?
A. A United States Plywood truck was stopped and a fellow by the name of Swanson, I believe.

Mr. Whelan: I move to strike those two last answers [fol. 38] on the grounds they are conclusions and opinions and no foundation laid.
The Court: Overruled.

A. Swanson was stopped and turned around and the Southern California Freight Line, and I don't recall the names of the others, but there are some others, a number of them.

By Mr. Archer:

Q. Do you recall any Culy Freight Company trucks were ever stopped?

Mr. Whelan: Objected to on the grounds it is leading and suggestive and no foundation.
The Court: Overruled.

A. One of the boys from the Culy Freight Company said that he asked the union——

Mr. Whelan: I move to strike that as hearsay.
Mr. Archer: We are getting into hearsay again.
The Court: It may be stricken.
Mr. Archer: You can't tell what he said.

Q. Did you observe any other trucks, in your recollection, that have been stopped out there?
A. Why the Culy Freight Company, they have been refusing to come in.

Mr. Whelan: I move to strike that on the grounds that there is no foundation laid and a conclusion and opinion and because of his previous answer it is obviously hearsay.
[fol. 39] The Court: Well, it is apparent to me if he had some stuff ordered that was on the truck and it didn't come in, he can testify they refused to come in.

A. They had it delivered to the Hayward Lumber Company.

By Mr. Archer:

Q. In one instance they delivered goods consigned to you to the Hayward Lumber?

A. Yes.

Q. Has the same been true of goods delivered to the Escondido Lumber Company?

Mr. Whelan: Objected to as leading and suggestive and no foundation laid.

The Court: Overruled.

A. Yes.

By Mr. Archer:

Q. Have you had any similar situation with the Pine Tree Lumber Company?

A. Yes.

Q. Any others?

A. No, that is all.

Q. Have you had any difficulty with the Cobb Sash and Door Company?

Mr. Whelan: Objected to as leading and suggestive.

The Court: Overruled.

A. The Cobb Sash and Door Company refused to bring our merchandise into our place.

[fol. 40] Mr. Whelan: Move to strike that on the grounds it is hearsay and conclusion and opinion of the witness.

By Mr. Archer:

Q. I will ask it this way——

The Court: Did you have an order with him?

A. Yes.

The Court: Did you ever get it?

A. They had to take it to another yard.

The Court: They did take it to another yard?

A. Yes.

The Court: Overruled.

By Mr. Archer:

Q. What about Western Metal?

A. They had to take their merchandise we had purchased from them to another yard.

Mr. Whelan: Move to strike on the grounds it is opinion and conclusion.

The Court: We will strike "they had to" and leave the rest stand.

By Mr. Archer:

Q. You placed an order with Western Metal?

A. Yes.

Q. Was it delivered to your yard?

A. No.

Q. Where was it delivered?

A. To Pine Tree Lumber.

[fol. 41] Q. Did you have an order with Kresmer of Riverside?

A. Yes.

Q. What does he, or they, supply?

A. Sash and doors and plywoods and that was delivered to Pine Tree Lumber.

Q. Do you recall any other similar situations?

A. Most all the merchandise that we purchased, like hardware, sash and doors, plywoods, we have not been able to receive that in our yards. It has had to be delivered to some other location in Escondido.

Mr. Whelan: I move to strike that on the grounds it is a conclusion and opinion of the witness, based on hearsay.

The Court: Overruled.

By Mr. Archer:

Q. Do you have available now, Mr. Garmon—withdraw that. I think there will be added up a memorandum of the competitive figures and volume of business before and after the picketing. I think those were the handwritten figures you handed me this morning?

A. Yes.

Mr. Archer: They are being added so we will withhold on that. Reserving that right to recall this witness, your Honor,

with respect to some summaries of additions he has taken from their records, that will conclude the direct examination.

The Court: Very well. You may cross-examine.

[fol. 42] Cross-examination.

By Mr. Whelan:

Q. Mr. Garmon, what is the wage that your men are presently receiving in the yard?

A. I don't have those figures with me. Our truck drivers draw about $1.80 and hour and our yard men, I believe it is one dollar and sixty five or sixty eight. I am not sure which.

Q. Now you say that if the men are off sick for three or four days their pay continues?

A. Yes.

Q. And if a man wants to take a day off, that is all right, and his pay continues?

A. Yes.

Q. I suppose your men all get holidays, do they?

A. Yes.

Q. How many hours per week do they work?

A. We work 44 hours.

Q. And is there any provision with your agreement with your employees to pay them over time if they work longer than 44 hours?

A. If they work over 44 hours?

Q. Yes.

A. No, sir, we don't.

Q. Now have they always received this scale of wages?

A. No, sir. We have raised our wages for various [fol. 43] times for the last number of years.

Q. Well, since, say, August 15, 1952, has there been a general wage increase paid to your employees?

A. Yes, there has been.

Q. And how many wage increases since August 15, of 1952?

A. They have all had some raises.

Q. Well, was it a general blanket raise to all of the employees?

A. Yes, uh-huh.

Q. And what percentage increase did they receive?

A. Oh, I would say four or five cents an hour, something like that. I wouldn't want to be sure of that figure.

Q. And when was that increase granted to them?

A. I think it was in March or April.

Q. March or April of 1953?

A. Yes.

Q. And that was the first raise since August 15, 1952?

A. No.

Q. When was there another raise between August 15, 1952 and March or April of this year?

A. I don't know whether I have those—any record of that or not.

Q. Would you say it was around December 1st of 1952?

A. Could be.

[fol. 44] Q. What is your best recollection on it, Mr. Garmon?

A. Without the record I wouldn't want to tell you definitely. It was probably six months ago, or four months ago. I just don't remember.

Q. Who has that official record?

A. In our office.

Q. Could that be available for us, say, tomorrow morning?

A. Surely.

Q. Then there were two general blanket wage increases since August 15, 1952, is that correct?

A. I believe that is right.

Q. And, roughly speaking, one was around December 1, 1952, and the other was March or April of 1953?

A. I think that is pretty close to being correct.

Q. Now you were present at a meeting in August of 1952 held at the Beach Hotel in Oceanside, weren't you, where most of the Northern County lumber yard owners were present?

A. Yes.

Q. And with you at that time was Mr. Dick Heffern, who is a representative of yours?

A. Yes.

Q. And at that time do you know whether or not some of the Northern County lumber yards, particularly those along the coast, signed contracts with the labor unions

[fol. 45] similar to the contract that was presented to you?

A. They didn't sign at that time, no.

Q. They didn't sign that meeting, that night of August 14th, but they did sign shortly thereafter, didn't they?

A. I understand that one did, yes.

Q. Which one did?

A. I believe it is St. Malo Lumber.

Q. What about the Encinitas Lumber Company?

A. That I don't know.

Q. You don't know whether the employees of the Encinitas Lumber Company became members of the union and the Encinitas Lumber Company signed a contract with the labor union or not?

A. No, sir.

Q. But you do understand that St. Malo signed a contract and the employees became members of the union?

A. Yes.

Q. You say Mr. Collins came to see you about the middle of November, 1952, is that right?

A. It was somewhere near that, I think.

Q. And at that time he left you a copy of the agreement similar to this Plaintiffs' Exhibit 1?

A. That is right.

Q. And then, you read it over and discussed it with your partners?

[fol. 46] A. Yes.

Q. When was it that Mr. Collins came to see you again?

A. I would say in a month or so, something like that.

Q. Well, in the meantime after he left the copy of the contract with you you raised your employees' wages, didn't you?

A. I wouldn't know without looking at my records. I doubt it, not on the strength of that, no, sir.

Q. Directing your attention to the month of February, 1953, do you remember talking to Mr. Collins and Mr. C. O. Taylor, whom we commonly refer to as "Spud" Taylor?

A. In what month, please?

Q. On or about the first of February, 1953?

A. I imagine I talked with him then.

Q. Now after Mr. Collins had left the contract along about the middle of November, 1952, had you seen him

again before this meeting where he and Mr. Taylor were together?

A. Yes, I think Mr. Collins had been in before that.

Q. Probably two or three times before Mr. Taylor came in with Mr. Collins?

A. Well, he was in two or three times. I remember that very distinctly.

Q. And at that time, on or about the first of February, was the contract that Mr. Collins had previously left with you discussed?

A. We talked about it some, yes.

[fol. 47] Q. And did he at that time have with him in his brief case some additional blank forms, contract forms?

A. I don't recall it if he did.

Q. Did you at that time ask him if that was similar to the contract that he left with you some months previously and didn't he reply, "Yes, it is identical to the contract which I left with you and which we discussed in the Oceanside Beach Hotel"?

A. I think he said it was the same copy as discussed at the hotel.

Q. Didn't he tell you it was the same form of contract that he had left with you a couple of months previously?

A. That I don't remember that he did, no.

Q. At that time when Mr. Taylor was present, on or about February 1st, didn't he tell you that before they entered into a contract with the lumber yards that they first of all discussed the—the matter of union membership with the employees and they didn't sign up a yard until the employees had all joined or agreed to join the union, in other words, until they represented the employees?

A. That was only mentioned at one time and that was the time I took Mr. Collins out and introduced him to these men to talk with.

Q. What date was that, sir?

A. That I couldn't tell you, sir.

Q. Would you say that was on or about March 26 of [fol. 48] 1953?

A. It might have been sometime in March. I expect it was in March or April.

Q. Either March or April?

A. Yes.

Q. Now at the time that Mr. Collins was there and you took him out and introduced him to the employees was he accompanied by anyone else?

A. I believe there was another party with him.

Mr. Whelan: Mr. Aust, will you stand up?

A. Yes, that is the gentleman.

Mr. Whelan: For the record, that is Mr. Bob Aust, an Assistant Business Representative of Local 36.

Q. Then you left Mr. Collins and Mr. Aust alone with the employees?

A. Yes.

Q. What conversation took place between them and the employees you don't know?

A. No, I wasn't there.

Q. Now on that same day do you remember that Mr. Taylor and Mr. Packard came to the yard and later talked to you in your office?

A. On the same date?

Q. Yes.

A. I really don't.

Q. You are acquainted with Mr. Packard, aren't you?

[fol. 49] A. I probably would if I could identify him.

Mr. Whelan: Stand up, Mr. Packard.

A. Yes.

By Mr. Whelan:

Q. You had seen him out at your office with Mr. Taylor?

A. Yes.

Q. And, of course, you know Mr. Taylor?

A. Yes, sir.

Q. Now on that day you say that it was explained to you that the union didn't want you to sign a contract until they represented the employees, that is, the employees agreed to become members of the union?

A. When Mr. Collins came back into my place of business we sat down and I told him then, I says, "I don't know whether my men want to join up with any union", and then

I believe I told him that the men would have to O. K. it at that time.

Q. Well, on or about March 26, 1953, didn't Mr. Collins, in the presence of Mr. Aust, tell you that they didn't want you to sign the contract until they represented the employees, that they would like to talk to the employees and explain the contract to the employees and then if the employees agreed to join the union they wanted you to sign the contract?

A. I don't remember that.

[fol. 50] Q. What was Mr. Collins' statement to you as near as you can recollect?

A. Now really, most of our conversation was that Mr. Collins was—just various things we would talk on. He would ask me to sign the contract and I would tell him I wasn't ready to sign it. Then our conversation would go into something else, maybe politics.

Q. All I want you to do is try and concentrate on what he told you about the union representing the employees, what he said to you in that connection?

A. After he had come out and talked with the employees and come back in our office I believe Mr. Collins stated that he would have to get the O. K. from the employees.

Q. Isn't it true on or about February 1, 1953, when Mr. Collins and Mr. C. O. Taylor first met with you that is the first time Mr. Taylor met with you, when Collins was present, that they explained to you that they wanted to get the men to become members of the union and after they got the men signed up, agreeing to become members of the union, then they wanted you to sign the contract that had been previously presented?

A. Here is what Mr. Taylor and Mr. Collins said me: If we would sign the contract we would get a lot more business through their effort of telling the contractors to trade with us. Those were his very words.

Q. Now you didn't quite answer my question. My [fol. 51] question was didn't Mr. Taylor and Mr. Collins say to you that first of all they wanted to get the employees to become members of the union, or to agree to become members of the union, and then they wanted you to sign the contract?

A. No.

Q. You are positive?

A. I am sure of it.

Q. Didn't you at one time tell them if your employees would agree to become members of the union that you would sign the contract?

A. If my employees came to me and asked me to sign a contract and they wanted to join, I would have said yes.

Q. Now what meeting was that that you told that to Mr. Collins and Mr. Taylor?

A. Well, it was one of the last meetings, I believe.

Q. Well, could you fix it in your mind, attach it to any particular date?

A. Well, sir, I don't believe I can fix it exactly because it was right on the last meeting that we had with him.

Q. Didn't Mr. Collins tell you in this conversation of February 1st or about February 1st, 1953, that they had signed a contract with the Encinitas Lumber Company and with St. Malo Lumber Company but they wouldn't permit Mr. Gauthier or Mr. Meredith to sign the agreement until they had represented the employees to everybody's satisfaction?

[fol. 52] A. No, I don't know as he did.

Q. Did he explain that to you as to one of the lumber companies?

A. No.

Q. What did he say about the St. Malo Lumber Company contract?

Mr. Archer: Was that before or after the picketing?

Mr. Whelan: February 1, 1953. Before the picketing.

A. I don't believe he said anything about their contract. He mentioned the one that he showed us in the hotel that night.

By Mr. Whelan:

Q. Didn't he tell you he had asked Mr. Meredith to call a meeting of the employees at St. Malo and it was only after the employees had indicated a desire to become members of the union and signed the application for membership that they permitted Mr. Meredith to sign the contract?

A. No, sir.

Mr. Archer: I may have misunderstood you, Counsel. I am trying to fix in my mind the time. Was this before or after St. Malo was picketed for nine months?

Mr. Whelan: I don't know if they were picketed for nine months or if they were picketed for one month, but I am asking him if, on or about February 1, 1953, Mr. Collins told Mr. Gauthier that the union didn't care to enter into a [fol. 53] contract with him unless and until the employees indicated a desire to become members of the union?

A. I don't remember that at all.
Q. Would you testify he didn't say that to you?
A. I sure would.
Q. And you do?
A. Yes, sir.

The Court: It is twelve o'clock, Mr. Whelan. We will recess until—Ordinarily we come back at 1:30 but I have a motion for a new trial which I will try to hear at 1:30 and this case will resume at 2:00.

Mr. Whelan: Thank you, your Honor.

(Noon recess.)

The Court: You may proceed.

William A. Garmon, a plaintiff herein, recalled as a witness for and in his own behalf, and having been previously sworn, resumes the stand and testifies further as follows:

Further cross-examination.

By Mr. Whelan:

Q. Mr. Garmon, did you bring your original books and records with you today?
A. Covering what?
Q. Well, covering the amount of business that you did prior to the time that this picketing commenced and the [fol. 54] amount you have done since then as a basis for sustaining your claim of damages?
A. Yes, I did.

Q. You brought the original records. And then in case you have not, would you bring those original records with you in the morning when you bring in the records showing the different pay increases?

A. I will.

Q. This proposed agreement, which is Plaintiffs' Exhibit 1, contains a provision on page 4 in Section 5, Subdivision A, "No employee shall be reduced in his hourly wage rate, as shown in Section 3 A and B hereof, by virtue of the signing of this agreement." Were you familiar with that provision?

A. No, sir.

Q. Was that discussed with you at all by Mr. Collins at the time that he left the agreement with you in November 1952, or in any of these subsequent conversations?

A. That was not discussed at all.

Q. Not discussed at all?

A. No, sir.

Q. Now after the conversation which took place between you, Mr. Taylor and Mr. Collins on or about February 1st, 1953, did you have a subsequent conversation on or about February 27, 1953, just between Mr. Collins and yourself?

[fol. 55] A. Did we have a conversation, you say?

Q. About that date, about February 27, 1953?

A. I would say we might have, yes.

Q. During that conversation did you tell Mr. Collins that you had enjoyed the various contacts with him and that you thought he had conducted himself very truthfully and been very patient in discussing these matters with you and that you appreciated his patience?

A. I told him that I thought he was a gentleman.

Q. Well, did you also tell him that you thought he had been very truthful in discussing these matters with you?

A. I don't know as I told him that. I don't know there was any occasion for me to tell him that.

Q. Did you tell him that you thought he had been very patient in the discussions and that you appreciated that patience?

A. I don't believe I meant it that way, if I said anything like that. I know he was out there a number of times.

Q. Well, did you on that occasion on or about February

27, 1953, tell him in substance that you would probably give him some kind of a yes or no answer by March 15th?

A. I did.

Q. Then on or about March 16, 1953, do you remember [fol. 56] Mr. Taylor and Mr. Packard and Mr. Collins being out at the plant at a time when your nephew, Mr. Max Garmon, was there?

A. I don't believe I was in the office at that time.

Q. Well, do you remember driving up to your office at a time when Mr. Taylor, Mr. Garmon, Max Garmon, and Mr. Packard and Mr. Collins were there and do you remember Mr. Max Garmon saying this: "You should be willing to wait a little longer because just as soon as we sign the others will sign within a week?

A. I don't remember just that conversation. I remember that they stated that we would be the only yard that they would sign up if we would sign it.

Q. You mean they said they wouldn't want to sign up any other yards out there?

A. That is right.

Q. Who said that?

A. For one year, anyway.

Q. Who said that?

A. Two or three of them; at least, two of them said that.

Q. Which two?

A. I would say Mr. Collins, for one, and Mr. Taylor.

Q. Isn't it true that at that time Mr. Collins said that he had no objection to waiting a little longer as long as it would benefit everyone?

[fol. 57] A. He might have said it.

Q. Now referring back again to that meeting about March 26, 1953, when Mr. Aust and Mr. Collins were out there, I believe you said that you took them out and introduced them to the men?

A. I don't know just what date it was, but I introduced them to the men.

Q. Isn't it true that you weren't there when they called towards the latter part of March, 1953, and that your brother, Mr. J. S. Garmon, had Mr. Jack Rutledge, the foreman, call the meeting and that you arrived sometime after the meeting with the men had been called?

A. I don't recall that at all, no, sir.

Q. Can you pinpoint the date on which Mr. Collins asked you for the privilege of meeting with the men?

A. I don't believe I could, not exactly, no, sir.

Q. Do you remember what Mr. Collins said his purpose was in asking to meet with the men?

A. Mr. Collins asked me if I was ready to sign up the contract. I told Mr. Collins, I said "I don't know whether my men wants to become members of the union. I will take you out and you can talk with them yourself, personally." That was just about our conversation on it, which I did.

Q. When Mr. Collins came back in your office after that transaction you have just told us about, did Mr. Collins tell [fol. 58] you all the men were agreeable to becoming members of the union?

A. He said he thought they were.

Q. Then when he said he thought they were, what did you say?

A. Well, if I remember right, I told him I would like to talk with the men.

Q. You told him you would like to talk to the men?

A. Like to talk, to see whether that was the facts.

Q. Now what you did say to him at that time was that you would like to have a couple of days more so that you could talk with each of your employees and reach a determination, isn't that right?

A. I wanted to talk to my employees and see whether—what they said coincided with what Mr. Collins said.

Q. And at that time didn't Mr. Collins say to you that $1.75 an hour would be pretty close to the average for the men?

A. He might have.

Q. Didn't you say to him at that time, "Where do you expect me to get the additional money"?

A. I might have said it.

Q. And didn't he say to you that by the increased volume of business that you would probably do, isn't that right?

A. He probably did, yes.

Q. And then didn't you say this to him, in substance: [fol. 59] "Wouldn't it be better for all concerned if you

were to wait another week and maybe get another yard to go union"?

A. I told him that if all the other yards were willing to sign up in Escondido, I would go along, too, if my men wanted to.

Q. Then just before that meeting terminated didn't you tell Mr. Collins, "Well, O. K. I will arrange to meet with Mr. Geib on Thursday and you come in and see me next week"?

A. I told him I was going to talk to Mr. Geib, yes.

Q. Didn't you, during one of those conversations with Mr. Collins, say to him, "Why do you want to get my men into the union? Why don't you go talk to the Pine Tree Lumber Company. They are the ones that need to be unionized."

A. Yeah, I said that.

Q. Didn't you tell him the Pine Tree Lumber Company were employing wetbacks?

A. As I understood it.

Q. You told Mr. Collins that?

A. That they had employed some wetbacks.

Q. So you wanted him to see them first and get them organized first, is that right?

A. Not necessarily.

Q. That is what you told him at any rate?

A. I told Mr. Collins if all the yards in Escondido would sign up I would talk to my men about if they were [fol. 60] willing to sign up under that arrangement.

Q. You did tell him, however, you thought he ought to go to work on the Pine Tree Lumber Company before he went to work on the Valley Lumber Company?

A. I don't know as I remember saying exactly those words. I told him I thought the other yards should be signed up at one time, not just single us out alone.

Q. Didn't he say to you in substance that, "We have to deal with the employers one at a time and deal with the union members in one organization one at a time"?

A. Not that I know of, he didn't, no.

Q. You did, however, pinpoint the Pine Tree Lumber Company as being an organization you thought he ought to talk to because they had been employing wetbacks?

A. He brought that up himself about the Pine Tree Lumber Company.

Q. You had had a date with him for the following week, didn't you, with Mr. Collins?

A. I believe he said he would be back.

Q. Well, you told him you were going to see Mr. Geib the following Thursday?

A. I told him I would talk to Mr. Geib.

The Court: Who is Mr. Geib?

Mr. Whelan: Geib is the name of——

A. He owns the Escondido Lumber Company.

The Court: O. K.

[fol. 61] By Mr. Whelan:

Q. That is spelled G-e-i-b (spelling)?

A. I believe it is.

Q. So the following week you weren't at your place because you had been called to Orange County because of illness in your family?

A. That is right.

Q. And if Mr. Collins came back the following week you didn't see him because you were out of town?

A. Yeah.

Q. Now that was the last time you talked to Mr. Collins, wasn't it?

A. I believe it was.

Q. Do you remember when you next talked to a representative of any of the unions?

A. Well, the gentleman from Oceanside, he was in to see me, of the Carpenters' Union. He came in and talked with me some and was explaining the advantages if we would become union, what they would do for us and it would throw the trade to us and I told him, I said, "I don't want it that way". I said, "We don't do business that way". I says, "If we can't sell—that method, we just don't want no part of it".

Q. When was that date, do you remember?

A. I don't remember the date of it, no.

Q. Well, did you say anything to him at that time [fol. 62] about bringing Mr. Taylor up to talk to you?

A. I don't think so. I don't believe I asked him to.

Q. Would that conversation have occurred approximately April 14, 1953?

A. It could have.

Q. Well, then, the first of the next week did Mr. Taylor and Mr. Packard and Mr. Carlin come up to your place of business?

A. Yes, they did.

Q. And at that time was there some discussion with you concerning a statement that had been made during your absence to representatives of the union by Mr. Max Garmon?

A. Yes.

Q. Did you tell the representatives of the union at that time, Mr. Taylor, Mr. Packard and Mr. Carlin, that although you folks were partners up there, that is to say, you, your brother and your nephew, that you operated and managed the yard and you had the final say?

A. That I am the manager, yes.

Q. Didn't you say to them you were presently troubled, at that time that you had a damage suit going on in court resulting from a man falling from a scaffold on a claim which was that a faulty board had been sold by your company and that you didn't care to discuss any union business with them that day, but would like to see them the following week?

A. I don't know whether I told them I would like to [fol. 63] see them the following week or not. I told them I was not interested in discussing any union, that I had too many things on my mind.

Q. You did tell them one of the principal things on your mind, that was that lawsuit?

A. Yes.

Q. Then they did come back, at least, Mr. Taylor and Mr. Packard came back the following Thursday?

A. That is right, or a few days afterwards, at least.

Q. Wasn't it Thursday, about April 23rd?

A. Well, I couldn't give you the date on it. I think it was April 27th.

Q. You think it was Thursday, April 27th?

A. I believe it was, the day before the date the picket was on our place of business.

Q. Now I don't want to be taking advantage of you, Mr. Garmon, but I think that the 27th of April was on a Monday, wasn't it?

A. Well, it could be. I am not sure.

Q. And isn't it true that at that meeting, that last meeting you had with Mr. Taylor before the picket was put on, that that was on a Thursday before the picket was put on?

A. Might have been a telephone conversation, but not personally, I don't believe. He called me on the phone.

Q. When did he call you on the phone?

A. Well, it was three or four days, or I would say a [fol. 64] week before I saw him the last time which was on the 27th, I believe. He called me on the phone and wanted to know if we wouldn't come on and sign a contract with them and that he had to take the hard way, or was going to have to take the hard way to force us in.

Q. When you last left Mr. Taylor, or when he last left you, before the picket line was put out, didn't you and he shake hands?

A. The last time I saw him, you mean?

Q. Yes.

A. I think I offered to. I always shook hands with the boys that come into my office.

Q. Do you recall whether you did or not?

A. I wouldn't want to say for sure but I wouldn't doubt it. One of them did. There was two of them. I think Taylor and I did shake hands.

Q. Now you testified this morning—withdraw that. You never saw Mr. Taylor any more before the picket line was put on after you and he shook hands that particular day, did you?

A. Yes.

Q. When did you see him next?

A. Across the street.

Q. That was after the picket line was put on, wasn't it?

A. Yes.

[fol. 65] Q. What I am getting at is that the time you left Taylor, or rather he left you at your office, before the picket

line was put up and you shook hands, you never saw him again until after the picket line was established?

A. I believe that is right. I saw him the same day, I think, that the picket line was put on.

Q. Now you testified this morning about people following your trucks and identified Mr. Carlin as being one that you say followed the trucks, is that right?

A. The ones I identified this morning, yes.

Q. Well, did you see this man follow the truck?

A. Yes.

Q. And how long a distance did you see him follow it?

A. Well, I would say a number of blocks.

Q. You said that your yard was at 144 East Grant?

A. Yes.

Q. Is that inside of the city limits of Escondido, just across the line?

A. Across the line.

Q. When did you see Mr. Collins following the truck?

A. Oh, Mr. Collins followed our trucks from before the picket line went on our place.

Q. But not afterwards?

A. I don't believe I have seen him afterwards, no.

Q. And you say that some of these people handling merchandise did not cross the picket line?

[fol. 66] A. Yes.

Q. And in those cases the merchandise was delivered to some yard friendly to you and then your trucks would pick up the merchandise at those other yards, is that it?

A. Yes.

Q. So that you always got your merchandise; it was simply inconvenient, is that right?

A. Inconvenient and expensive.

Q. But you did get the merchandise?

A. Yes.

Mr. Holt: Will the Court give us just a moment, please?

(Off the record discussion between counsel for the defendants.)

By Mr. Whelan:

Q. Now, Mr. Garmon, on your direct examination in response to a question by Mr. Archer, you stated that you

paid your employees as much or more than the amount provided for in the contract. That wasn't true as of the date that the contract was presented to you, was it?

A. I don't imagine it was the date it was presented, no.

Q. Was one of the reasons why you increased the pay of your employees so that they would not decide to join the union?

A. No, sir.

Q. How many wage increases did you give your em-
[fol. 67] ployees prior to August 15, 1952, within the year prior to that time?

A. I wouldn't know without looking on my records.

Q. But this much is true, that you gave the two wage increases since St. Malo Lumber Company signed up with the union?

A. I would have to look on the dates before I could say yes on it. It could be possible.

Q. Those are the records I have asked you to bring in in the morning?

A. Uh-huh.

Q. The records which show the wage increases subsequent to August 15, 1952, and any increases that were paid for one year prior to August 15, 1952?

A. O. K.

Q. And the first of those wage increases was given probably within a month following Mr. Collins' leaving the contract with you on November 15, 1952, isn't that right?

A. I couldn't say without I would have to have my records to be able to give you that information.

Q. And the next wage increase was given shortly after this meeting with the employees in which Mr. Collins and Mr. Aust were present, isn't that right?

A. It could be.

Q. And the purpose in giving them the wage increase at that time was in order to satisfy them so they would not
[fol. 68] elect to join the union, isn't that right?

A. No, sir.

Q. Well, what was the reason?

A. Because my employees have been loyal to me and I tried to be loyal to them as well. I have no dissatisfied employees in our business.

Q. But it took the two visits from Mr. Collins with this contract to bring about the wage increases?

A. No, sir, it did not.

Q. There were two wage increases there within five or six months, isn't that so?

A. I wouldn't want to answer that until I have my records before me to see. Mr. Collins had nothing to do with any wage increases.

Q. Just a happy coincidence?

A. I wouldn't say that.

Q. Did you tell your employees that you did not want them to join a labor union?

A. Never.

Q. Do you personally have any objection to your employees joining a labor union?

A. If they want to it is their right.

Q. Will you read the question, please?

(The record read by the reporter.)

A. No, I do not.

Q. Have you told your employees that you had no [fol. 69] objection to their joining the labor union?

A. Yes, sir.

Q. And who was present when you told them that?

A. Well, two or three of the boys, at least, at the time.

Q. Two or three of what boys?

A. The boys that work for me.

Q. Did you have individual meetings with each of your employees?

A. No, sir.

Q. But you had possibly separate meetings with two or three at a time, is that it?

A. Maybe they would be in the office or we would be around the stove early in the morning and I would say, "It is up to you boys if you want to join the union. It is your business. You join any time you wish."

Q. Didn't you tell them you didn't want to have anything to do with the union if you had your own way about it?

A. No, sir.

Q. Never said anything like that in substance?

A. No, sir.

Q. Would you be willing to have a meeting with your employees and with the representatives of these unions involved in this lawsuit and state in the presence of these labor representatives that it is all right with you that the employees join the union and become members thereof?

[fol. 70] A. I would be very glad to.

Q. You would be willing to do that?

A. Yes, sir.

Q. Did you ever have a union man in your employ, if you know?

A. Not that I know of.

Q. Did you tell your employees when you talked with them that you had never signed a contract with a labor union?

A. I don't know as I did.

Q. Did you as a matter of fact, ever sign a contract with a labor union?

A. No.

Q. And you don't remember whether you told your employees that you had never signed a contract with a labor union?

A. I don't quite understand your question.

Q. You don't remember whether or not you told your employees that you had never signed a contract with a labor union?

A. I don't know as I ever had to. They never asked me.

Q. You mean your employees never asked you?

A. No.

Q. Now when you talked with Mr. Taylor and Mr. Collins [fol. 71] on or about the first of February, you don't recollect Mr. Collins stating to you in the presence of Mr. Taylor that you should discuss this question with Mr. Meredith and Mr. Gauthier?

A. That I should?

Q. Yes.

A. No, sir, I do not.

Q. They never said anything like that to you at all?

A. I don't recall it if they did.

Q. Now you have said that Mr. Collins came into your office after he had talked to your employees and told you

that the men had all indicated a willingness to become members of the union, is that right?

A. That is about what he said, yes.

Q. Then you said, "Well, let me think it over a couple of days. I want to mull it over in my mind"?

A. I said I would like to talk with the men and see whether that is the fact or not.

Q. You didn't offer then to go out and talk to your men then in the presence of Mr. Collins to find out whether Mr. Collins had stated the truth to you?

A. The reason I didn't was about two-thirds of the men had gone home. Only one or two left at that time.

Q. Did you go out and talk to those one or two while Collins was there?

A. I talked to Mr. Rutledge.

Q. I mean in Collins' presence?

[fol. 72] A. No.

Q. You didn't ask Mr. Collins to come back the next day so that you and he could talk to the men together, did you?

A. I don't recall whether I did or not. I don't believe so. I might have.

Mr. Whelan: Except for the fact we would like to have the records brought in as I have indicated, your Honor, that is all the cross-examination.

The Court: Very well.

Redirect examination.

By Mr. Archer:

Q. Various conversations between you and Mr. Collins with respect to what may have happened at St. Malo has been referred to. Was the same St. Malo picketed by these same unions?

Mr. Whelan: That is objected to on the grounds it is improper redirect examination, and irrelevant.

The Court: I will sustain the objection.

Mr. Whelan: If an answer was given I would like to have it stricken.

The Court: I didn't hear it. If there was one given it will be stricken.

By Mr. Archer:

Q. What was the primary subject of the conversations [fol. 73] that you had between or with Mr. Collins and Mr. Taylor?

Mr. Whelan: That is objected to on the grounds it calls for a conclusion and opinion of the witness and I have no objection to any question being gone into fully but let the Court draw the conclusion as to what was the primary subject.

By Mr. Archer:

Q. What subject consumed the bulk of the time during these conversations that we have been discussing?

A. Well, usually the boys would, at the times I talked to them, they would come in and want to know if I was ready to sign the contract and I told them no and we would get into conversations about different things, maybe business conditions, and talk about things in general. And they were all the time telling me how much extra business that we could receive by signing up with them and that was about the substance of our conversations most of the time. They were always friendly conversations.

Mr. Whelan: Was that "friendly conversations"?

A. Yes.

By Mr. Archer:

Q. On cross-examination you indicated that you do not pay or did not pay overtime for hours worked over and above the regular 44 hour work week?

A. That is right.

Q. You compensate your men in some other manner?

[fol. 74] Mr. Whelan: That is objected to on the grounds it is leading and suggestive.

The Court: Overruled.

A. Yes, we figure we did. They had their days off when they wanted and they would come late to work in the mornings if they wished. If they worked an hour over time they would come to work an hour later. A good many

times maybe they would have to be off for a day and they would consider that some.

Q. In considering the wage increases that you have indicated were granted, did you consider the lifting of wage controls?

Mr. Whelan: That is objected to on the grounds it is leading and suggestive, if the Court please.

The Court: Overruled.

A. The last one, yes.

By Mr. Archer:

Q. Did you prepare from your original records a memorandum of your daily sales for April, 1953, and May, 1953?

A. Yes.

Q. Now I show you a handwritten memorandum on the letterhead of the Valley Lumber Company titled "1953, April Sales, Daily", and I will ask you if you prepared that from your records?

A. Yes, sir.

[fol. 75] Q. Attached to that is an adding machine tape and will you state what the total——

Mr. Whelan: That is objected to on the grounds it is not the best evidence.

Mr. Archer: Very well, Counsel.

Mr. Whelan: Incompetent, irrelevant and immaterial.

Mr. Archer: We will offer it in evidence.

Q. I show you a second memorandum on the letterhead of the Valley Lumber Company titled "1953, May, Daily Sales", and ask you if you prepared that from your original records?

A. Yes.

Mr. Archer: We will offer these in evidence, your Honor, as one exhibit, Plaintiffs' 2.

Mr. Whelan: We will object on the grounds it is incompetent, irrelevant and immaterial; it is not the best evidence; no proper foundation laid.

The Court: I think they are admissible under a section of the Code of Civil Procedure.

Mr. Whelan: I think they might be admissible if the original books and records were here.

The Court: I will make them available to you.

Mr. Archer: We had agreed, I understood, prior to this time, to make them available.

The Court: Yes. On the conditions the books will be made available they will be admitted.

[fol. 76] By Mr. Archer:

Q. I may be mistaken, but I think that information is available from these records, is it not?

A. That is right, the totals.

Q. The totals shown on there are shown on these yellow ledger sheets I have in my hand?

A. I believe they are, yes.

Mr. Archer: Do you want anything in addition to that to examine, Counsel?

Mr. Whelan: No, excepting the wage increases.

Mr. Archer: The dates of the wage increases?

Mr. Whelan: And the amounts, too, and whether or not any wage increases were granted for more than one year prior to August 15, 1952, and the amounts, if any.

Mr. Archer: You want any wage increases prior to August, 1952?

Mr. Whelan: Yes, and all wage increases since August 15, 1952, to date. That is for the purpose of comparison whether or not there were any wage increases for one year prior to August 15, 1952.

Mr. Archer: Do you have in mind the dates when there was wage control?

Mr. Whelan: Well, I think there was wage control up until after the first of this year.

Mr. Archer: I was wondering whether I had the burden of looking or whether you wanted to.

[fol. 77] Mr. Holt: From August, 1951, if we can have the records. That will do it.

Mr. Archer: Very well.

Q. Does your business follow any particular pattern in respect to increases or decreases over certain period of months?

A. To a certain extent, yes.

Q. What is the pattern of that, Mr. Garmon?

A. Well, if we have hired a new man and he has worked with us for two or three months, and he qualifies——

Q. I am sorry, you must have misunderstood me. Maybe you didn't hear me on account of that airplane. Does your business have a particular pattern as to increases or decreases during certain months of the year?

A. No.

Q. Is the volume of your business the same in the winter as it is in the summer?

Mr. Whelan: That is objected to on the grounds it is already asked and answered; leading and suggestive.

The Court: Overruled.

A. Yes.

By Mr. Archer:

Q. When does it begin to increase, if it does, and when does it slacken off again?

A. Starts increasing in the early spring and starts slacking off in the fall.

[fol. 78] Q. Is May usually a higher——

Mr. Whelan: That is a little leading at this point, I think.

The Court: He hasn't finished the question.

Mr. Archer: I stopped for the truck, your Honor.

Q. Which, if either, is the higher month, usually, April or May?

A. Usually May.

Q. Can you fix the time for us when you saw Mr. Garland following your truck, approximately when it would be, the middle of May or the end of May or when?

A. I would say about the middle of May, as close as I could tell you.

Mr. Whelan: That is spelled C-a-r-l-i-n (spelling).

Mr. Archer: What did I say?

Mr. Whelan: Garland, I think.

Mr. Archer: I am sorry. I had it written out. I ha[illegible] no further redirect examination.

Recross-examination.

By Mr. Whelan:

Q. Mr. Garman, do you know whether you did more business in May of 1952 than you did in April of 1952?

A. That I don't know without looking.

Q. Did you do more business generally in 1952 than you did in 1951?

[fol. 79] A. I believe we did, in 1952.

Q. Have you done more business generally in 1953 than you did in 1952?

A. I believe so.

Q. Now when you bring in those books in the morning could you bring in the records showing the amount of business done by your concern for April and May of 1952 and for April and May of 1951?

A. Yes.

Q. Now with reference to this compensation for overtime work that you calculate is taken care of by letting the employees have some days off to tend to other business, or to let them come in an hour late in the morning, do you have any written agreement with your employees on that score or is it just at your wish and your will?

A. It is verbal.

Q. Did you at any time during the period when we had wage controls petition the proper Federal Board for permission to grant an increase in wages?

A. No, sir.

Q. Did you know that employers, where the employees belonged to, or were members of unions, filed such petitions?

A. No, sir.

Mr. Whelan: Nothing further.

Mr. Archer: I have nothing further. You may step down, Mr. Garmon. Mr. Rutledge, will you take the stand, please?

[fol. 80] JACK RUTLEDGE, called as a witness for and in behalf of the plaintiffs, and being first duly sworn, testifies as follows:

Direct examination.

By Mr. Archer:

Q. Please state your full name?
A. Jack Rutledge.
Q. Where do you reside, Mr. Rutledge?
A. On Hale Avenue in Escondido.
Q. Where are you employed?
A. Valley Lumber Company, Escondido.
Q. In what capacity?
A. Yard foreman.
Q. Will you tell us are you what is generally considered to be a working foreman?
A. Yes.
Q. You mean by that that you work with the men?
A. I work right along with the men, yes.
Q. During these discussions with the union representatives, did they ask you to join the union?
A. I was present at the meeting, yes.
Q. You were to join the union if the group joined, is that correct?
A. Yes, true.
Q. Mr. Garmon has testified—withdraw that. You have been present in the courtroom here during the trial of [fol. 81] this case at all times while Mr. Garmon was on the witness stand testifying, is that correct?
A. Yes.
Q. You heard him testify about a meeting had by and between representatives of the union, Mr. Collins and some other man, and the employees of the Valley Lumber Company on or about April 1st. Did you hear of that meeting?
A. Yes.
Q. Were you present in the yard when Mr. Garmon brought Mr. Collins and the other man out into the yard to talk to you men?
A. Yes.
Q. Did Mr. Garmon remain out there after he had introduced the union representatives?

A. No, he didn't.

Q. After Mr. Garmon left, what happened?

A. Well, we talked it over and Mr. Collins read the union agreement to us and explained each item in there and we talked it over one way and another among ourselves.

Q. Were there any representations by Mr. Collins that if you would sign up the yard would get more business?

Mr. Whelan: That is objected to on the grounds it is leading and suggestive.

The Court: Overruled.

A. Yes.

[fol. 82] By Mr. Archer:

Q. Was there anything else that you recall at this time that was discussed other than the contract and this proposal that by signing up you would get more business?

A. All the conversation I don't remember. We discussed quite a number of things, about picking up material at other yards when we ran out, and just what el[illegible] I don't remember.

Q. Then did Mr. Collins and this other representative leave?

A. I think they went back in the office then.

Q. Went back into the office?

A. Yes.

Q. Did you thereafter have a discussion among the men as to whether or not you all wanted to join?

A. No, we had closed then and we didn't talk about it until the next day. We talked about it then but we didn't stay around there that night. We had already closed the gates, then.

Q. Then your major discussion about whether or not you wanted to join took place the following day?

A. That came later.

Q. Was there any representative of the union present at that time?

A. No.

Q. Was there any one of the partners of the business [fol. 83] present at that time?

A. No.

Q. What did the men decide?

Mr. Whelan: That is objected to on the grounds it calls for a conclusion and opinion and is hearsay.

The Court: I think we are entitled to know what they decided to do. I will overrule the objection.

By Mr. Archer:

Q. What did they decide to do? Did they decide to join the union or not to join it?

A. At that time we decided to leave it up to Bill and Stewart and Max, whether they wanted the union to enter.

The Court: Leave it up to who?

A. To Mr. Garmon.

By Mr. Archer:

Q. Did you report that to Mr. Garmon?

A. Yes.

Q. What did he say to you with respect to that?

Mr. Whelan: That is objected to on the grounds it is hearsay and self-serving, if the Court please.

The Court: I think it would be hearsay.

By Mr. Archer:

Q. Did you thereafter have further discussion among the men about it?

A. Yes.

Q. Was there any—withdraw that. Approximately how [fol. 84] soon after the first meeting was the second meeting?

A. I don't remember exactly. About a week or so. Might have been two weeks.

Q. Was there any representative of the company or management present at that meeting?

A. No.

Q. Was there any representative of the union?

A. No.

Q. Or unions, I should say. Did you have a discussion at that time as to whether or not the men wanted to join a union, or either of them?

Mr. Whelan: That is objected to on the grounds it is incompetent, irrelevant and immaterial and calls for hearsay.

The Court: Overruled.

Mr. Whelan: If the Court please, I think his first answer that they decided to leave it up to the management as to whether or not they wanted to join the union is the only answer that could be given. I mean that satisfies the question as far as this lawsuit is concerned.

Mr. Archer: Oh, no, it doesn't.

The Court: Overruled. You may answer.

Mr. Archer: Management doesn't have the say as to whether they join.

A. Will you repeat the question?

Mr. Whelan: Thank you, Mr. Archer.

[fol. 85] A. Would you repeat that last question?

By Mr. Archer:

Q. The question, I believe, that was pending to which an objection was made and overruled was: Did you discuss at the second meeting among yourselves as to whether or not you wanted to join a union?

A. Yes.

Mr. Whelan: Sam- objection as heretofore stated.

The Court: Overruled.

By Mr. Archer:

Q. What was decided?

A. No. We decided we didn't want to.

Mr. Whelan: May I have the benefit of the same objection, your Honor? I didn't get a chance to put it in before the witness answered the question.

The Court: It is subject to your objection and the objection shall be overruled.

By Mr. Archer:

Q. Subsequently to the second meeting among the men did you have a conversation with the representatives of the union?

A. No.

Mr. Whelan: Did he say "no"?
Mr. Archer: He said "no".

Q. Do you recall being called into the office by Mr. Max Garmon several days later?
[fol. 86] A. Yes.
Q. Do you recall who was present at that time?
A. Mr. Collins, Mr. Taylor and I think someone else, some other gentleman was there.
Q. Was it a Mr. Brown?
A. I think we have that name confused with—I don't know what it is now.
Q. Which one?
A. The gentleman in the brown coat back there.
Q. The man with the brown coat?
A. We thought his name was Brown.

Mr. Whelan: That man is Mr. Packard.

By Mr. Archer:

Q. That is Mr. Packard. Now can you place the approximate time of that meeting?
A. The date, I think, was—it was about two weeks before the picket line started, possibly three weeks.
Q. That would be approximately the middle of April?
A. Yes.
Q. And that is a meeting which you, I believe, have already testified was in the office?
A. Uh-huh.
Q. Now what was said at that time?
A. Well, Max wanted me as a representative of the men to give them the answer, rather than him give it to them.
Q. Did you do so?
[fol. 87] A. I did.
Q. What was that?
A. No, that we did not.
Q. What, if anything, was said by the representatives of the union then?
A. There was—I don't remember what it was.
Q. Can you remember the gist of what was said by them or by any of them?
A. I believe they said that they got the impression at

that meeting where they were present that we did want to join, but we changed our minds.

The Court: Did you ever tell any of these union people that you were willing to join the union, as a group?

A. No.

The Court: Did you ever tell Mr. Collins that?

A. No.

By Mr. Archer:

Q. Did you have any further conversations with any members of the unions from that date until—from that date to this date?

A. No.

Q. Directing your attention to April 28th when the picketing commenced, will you tell us what effect that has had on the operations of the yard, from your observation and your own knowledge?

[fol. 88] A. Well, it has made it very difficult on what deliveries we could deliver because we had to have the trucks tied up, picking up materials coming in. We had to go pick up freight coming in which we needed the truck for something else.

Q. Preventing you then from making a delivery out to a job?

A. Yes.

Q. I see. Have you been getting normal deliveries from suppliers?

A. No.

Q. Where do you get your deliveries?

A. Various places over town, other lumber yards, mostly.

Q. The Escondido and Pine Tree Lumber Company yards, and others?

A. Yes.

Q. Now in making your deliveries have you at any time observed any cars with any of these gentlemen that are present in court following your truck?

A. Yes.

Q. How often have you seen that?

A. Oh, five or six times a day.

Q. Five or six times a day every day since the picketing started you have seen them?

Mr. Whelan: That is leading and almost monotonous.

Mr. Archer: I am sorry.

[fol. 89] Q. How many automobiles have they had out there?

A. I have seen as high as four, possibly more than that up there. Four at one time.

Q. Explain to the Court how they operate that technique?

A. Well, there is just a car sits across the street there with one or two men in it and every time a truck leaves the yard they follow it.

Q. Has there been any of that in the last week?

A. Yes.

Q. That would be since May 20th?

A. Yes.

Q. Now fixing your attention on May 20th, when the temporary injunction was issued in this case, have you noticed any change in the activities with respect to the following of the trucks and the deliveries of materials to your plant since that date?

Mr. Whelan: That is objected to on the grounds it calls for a conclusion and opinion of the witness.

The Court: Overruled.

A. I can't see that there is much difference.

By Mr. Archer:

Q. Have you seen any representatives of the union going upon jobs where you were delivering materials?

A. I have not personally because I don't do the delivering.

[fol. 90] Q. I understand that you followed one of these cars containing some of these men about a week ago.

Mr. Whelan: Let's have the information from the witness so we can understand it, too.

By Mr. Archer:

Q. Is that correct?

A. Not myself, no.

Q. I misunderstood. I thought you had personally followed them. Did you follow with somebody else?

A. No.

Mr. Archer: You may cross-examine.

Cross-examination.

By Mr. Whelan:

Q. How long have you lived in Escondido, Mr. Rutledge?
A. A little over six years.
Q. How old are you?
A. 24.
Q. Have you ever belonged to a labor union?
A. Yes.
Q. Which one?
A. I don't remember the number of it. It was in an aircraft plant.
Q. Machinist Union?
A. Yes.
Q. Is that the only union you have ever belonged to?
[fol. 91] A. Yes, sir.
Q. Are you any relative of any of the Garmons?
A. Yes.
Q. What is your relationship to the Garmon family?
A. Max Garmon is my cousin; Stewart Garmon is my uncle.
Q. And, of course, William Garmon is your uncle?
A. No. Stewart Garmon is my uncle by marriage.
Q. Well, how about William Garmon. Is he any relative of yours?
A. I don't know just how you would classify that.
Q. What is the relationship between William Garmon and J. S. or Stewart, as you call him?
A. Brothers.
Q. You say Max is your cousin?
A. Yes.
Q. And William is probably your uncle by marriage, is that it?
A. No, I don't think so.

Mr. Holt: They are all in together anyway.
Mr. Whelan: All right.

Q. Anyway, you have been acquainted with the Garmon family all your life?

A. Yes.

Q. How long have you been the working foreman?

A. About two years, two and a half years, something [fol. 92] like that.

Q. Now you say that you were present at the meeting which took place out in the yard along towards the latter part of March?

A. Yes.

Q. Now when did you see Mr. Collins the first time on that date?

A. That was the date we had the meeting out in the yard with Mr. Collins?

Q. Yes, the meeting of the employees and that was behind the office building, wasn't it?

A. Yes. You mean did I see him before that?

Q. Yes, did you see him in the office, for example?

A. Yes, I saw him in the office. I didn't talk to him.

Q. On that occasion isn't it true that Mr. William Garmon wasn't there but Mr. J. S. Garmon was there and Mr. J. S. Garmon asked you to get the employees together so Mr. Collins could talk to them?

A. I don't remember which one it was. I was asked to get the men together, I know that.

Q. And isn't it true that after you had grouped the employees together that you came in and told Mr. J. S. Garmon that the employees were ready and Mr. Collins came out and introduced himself to them?

A. I don't remember the exact procedure, but we got [fol. 93] together out there in some manner.

Q. All right. Now you say that Mr. Collins read the contract over?

A. Yes.

Q. And several of the group asked questions, did they not?

A. Right.

Q. And isn't it true that about the time that these questions were being answered that Mr. Taylor and Mr. Packard, the man you called Brown, arrived?

A. I believe so. I don't know Mr. Packard.

Q. Packard, the man you have referred to as Brown.

A. Oh, yes.

Q. He and Mr. Taylor arrived while Collins was in the yard speaking to the employees?

A. Yes.

Q. By the way, Mr. Collins arrived at the yard about 3:30 in the afternoon that day?

A. Something like that. I believe it was later than that.

Q. Was Mr. Bob Aust with Mr. Collins at that time? Mr. Aust, will you stand up? This gentleman?

A. I believe that is the gentleman.

Q. Now isn't it true that there was one gentleman there who was a little older in years than most of the employees and that he raised a question whether or not the [fol. 94] increase in wages that he would receive would be used to pay his union dues?

A. I don't remember that.

Q. You don't remember that at all?

A. I don't remember much of that conversation.

Q. Isn't it true that all the members of the employees group indicated that they would sign up the application blanks and become members of the union and then this one sort of elderly gentleman raised the question about whether or not the increase in wages would be used up in paying the union dues?

A. We talked about it so much from one side to the other that I don't remember, don't exactly remember that. We talked about the good points and the bad points altogether there.

Q. Isn't it true that after all this discussion Collins asked every man individually if he would be willing to join and that they all stated that they would be willing to join the union?

A. I don't believe so. I would say not.

Q. You would say not?

A. Yes.

Q. Don't you remember this elderly gentleman, who was calculating what raise he would get and what his dues would be, was assured that if he worked for and under union shop conditions that he would get automatic increases [fol. 95] and then he said, "Well, I guess that is right. I will go along with the rest and join the union"?

A. There might have been part of that conversation, but not all of it.

Q. Tell me what part you had?

A. We all had our pencils out there figuring, but as fast as they said they would go along with the rest of us——

Q. The elderly gentleman said, "Well, I guess that is true" when the matter of wage increases was explained to him and he said, "Well, I will go along with the rest and join the union". Only one man said that?

A. I don't remember.

Q. Don't you remember each of the individuals there with the exception of yourself stated to Mr. Collins, stated that they would go along and sign up?

A. I don't remember.

Q. Don't you remember that you, yourself, said, well, you didn't like the contract because it didn't have any provision in it for an increased wage for the foreman over the other employees?

A. That is true.

Q. And didn't you say you thought that you ought to get about 35 cents per hour more than the other employees?

A. I did not.

Q. Did you say you ought to get 25 cents an hour over the other employees?

[fol. 96] A. I did.

Q. Do you remember when Mr. Taylor was there that he explained to you, well, it is customary for a working foreman in a shop where there is no mill to get a dollar a day more than the other employees and where there is a mill connected with the plant it is customary for the working foreman to get $2.00 a day more than the other employees, do you remember that?

A. Yes.

Q. And didn't both Mr. Taylor and Mr. Collins say that that matter of the increase in pay, or the additional pay for the foreman could be worked out?

A. That would be worked out between myself and the employer.

Q. Didn't they say that they would talk to the employer and help work it out for you?

A. They said they would talk to him.

Q. And help work it out, isn't that right?

A. That I don't know.

Q. Well, now, didn't you make the statement of fact after Taylor explained that the working foreman, where there was no mill connected with the plant, got $1.00 a day more, and where there was a mill he got $2, a day, more, didn't you then say you didn't think that was enough for a man of your responsibility and didn't Mr. Collins state to you, "What do you think would be a fair figure?" And [fol. 97] didn't you reply "35 cents per hour more"?

A. I did not.

Q. Nothing like that happened at all?

A. I did not reply "35 cents an hour".

Q. Everything like that happened except you said 25 cents an hour?

A. I did not say 25 cents an hour at that time.

Q. Now, at the conclusion of this meeting didn't Mr. Collins say to you with reference to your compensation that he would take it up with the management and see what he could get the management to agree to on your behalf before the contract was signed?

A. He said that they would have to get together and agree on something like that.

Q. Then didn't Mr. Collins say, "Well, I will go in now and see what Mr. Garmon has to say because I notice that he is back, and if you gentlemen wish to remain here I will report to you the result of my conversation with Mr. Garmon"?

A. I don't remember that.

Q. But at any rate the employees all left before anything was reported to them?

A. Yes.

Q. Now the next day when you had the meeting, I believe you testified on direct examination that "we", meaning the employees, decided to leave it up to Bill, Max and Stewart? Is that it?

[fol. 98] A. Yes.

Q. And that would mean the management?

A. Yes.

Q. Now when was it that this second meeting was had after the time that you decided to leave it up to Bill, Max and Stewart?

A. That was just two or three days before the last meeting with Mr. Collins and Mr. Garmon.

Q. That was the meeting you thought took place about two or three weeks before the picket line was established?

A. I believe that was around the time.

Q. Well, now at the time that you were present when this meeting was held with Max and Collins, Taylor and Packart, is it true that Mr. Bill Garmon was out of the city because of the illness in his family up in Orange County?

A. That is true.

Q. Would you say that meeting took place somewhere around April 6th, give or take a few days?

A. April 6th was on a Saturday. No.

Q. Could it possibly have been Tuesday? When you say April 6 was on a Saturday you are looking at the wrong calendar.

A. Oh, yes. It was about two weeks before the picket line went on.

Q. Now April 6th was on a Monday.

[fol. 99] A. Uh-huh.

Q. And April the 7th, of course, would be on a Tuesday, and the picket line went on about April 28th, three weeks later?

A. I believe Monday was the day they came in for their final answer.

Q. That would be about Monday, April 6th, right?

A. Uh-huh. So we must have had our meeting probably Friday.

Q. That would have been April 2nd?

A. Approximately.

Q. Now——

A. The date I don't remember.

Q. Was there any raise in wages granted by the management to the employees before this meeting of the employees which took place about Friday, April 2nd?

A. Was there any raise before?

Q. Yes.

A. Yes.

Q. How long before?

A. It was somewhere around the first of the year.

Q. Wasn't there a raise in wages about the last of March or first of April?

A. No. Wait a minute. No.

Q. How many raises in wages did the employees have since the first of the year?

[fol. 100] A. Depending on whether they were around the first of the year, before the first or afterwards, there was two.

Q. When was the last raise in wages?

A. About the 20th, I believe. Somewhere around there.

Q. 20th of what month?

A. After the picket line, after we decided not to join the union.

Q. After you decided not to join the union there was a raise in wages?

A. Yes.

Q. Was that about the 20th of April?

A. As to the date, I couldn't say about that.

Q. Now so that we get the month right, Mr. Rutledge, your recollection is that this last increase in wages was about the 20th of April?

A. It was after that last union meeting.

Q. What was that?

A. It was after that last meeting, whatever date that was.

Q. After the meeting at which you say Mr. Max Gorman was there?

A. Yes.

Q. And that meeting, we have fixed more or less as around Monday, April 6th, is that right?

A. Yes.

Q. So it was within a week or two following that?

[fol. 101] A. If that was around the 6th it was probably the following week then. It wouldn't be as late as the 20th.

Q. If that meeting was on the 6th then the raise in wages might have been Monday, April 13th, or could have been as late as Monday, April 20th?

A. Whatever the next Saturday comes on.

Q. Now when this meeting was held when you folks said no on Friday, April 2nd, had you had any conversation with either Max or Mr. Bill Garmon concerning their views on the unions?

A. Yes.

Q. And with which member of the partners did you have the conversation?

A. All of them.

Q. And who was present besides the three Garmons and yourself at that meeting?

A. I don't know. Probably one or two of the men in the yard and one of the men in the office.

Q. How many days was it before the meeting at which the employees decided to vote no as to union membership?

A. That I don't know. We talked about it every day.

Q. Well, the first vote you had was the day after Collins was there at which time it was voted that the employees would leave it up to the management, is that right?

A. Uh-huh.

Q. Then following that meeting several days intervened [fol. 102] before you had the meeting in which the employees voted no, isn't that right?

A. Yes.

Q. During those several days that intervened you had meetings with neither Max or Bill or Stewart Garmon, is that right?

A. Yes.

Q. And were they meetings where the group was called together or did you happen to bump into each other?

A. Both.

Q. What did Mr. *B*armon—you say "both"——

A. I mean one time we would meet with two or three of the men, and just wherever we happened to get together.

Q. Was there one meeting called where all of the Garmons were present and all the employees were present?

A. A meeting?

Q. Yes.

A. I don't think there was an actual meeting called, no.

Q. What did Mr. Max Garmon, for example, say to the employees concerning their joining the labor unions?

A. He said it was up to us.

Q. What else did he say?

A. That is all.

Q. Were you present at all times when he talked to the other employees?

[fol. 103] A. No, not all the time.

Q. What did Mr. Bill Garmon say about it?

A. He said it was up to us.

Q. And did you manage to be present any time any of the Garmons were talking to the other employees?

A. No. Oh, there was various times, like I said, when we happened to meet and we discussed it a few times, but any actual called meeting, no.

Q. Did Mr. Max Garmon say, for example, it was up to the men, they could join if they wanted to and it wouldn't make any difference in their jobs, but as far as he was concerned he wanted no part of the unions?

A. That is true.

Q. Who was present when Max Garmon made that statement besides yourself?

A. Right off hand I don't know. There was two or three people standing around.

Q. Two or three of the employees?

A. Yes.

Q. Tell me the names—how many times did you hear Max say that to the different employees?

A. Only once.

Q. Only once. And there was present only you and two or three other employees?

A. As I remember it.

Q. Now did you ever hear Mr. Stewart Garmon or Wil-
[fol. 104] liam Garmon make the same statement?

A. No.

Q. Did you ever hear Stewart Garmon make that statement?

A. Not exactly.

Q. What did he say in that connection?

A. He said it was up to us.

Q. Whether you joined the union or not it wouldn't affect your job, but he personally didn't want to have anything to do with the union?

A. He has his own ideas.

Q. He said that in substance?

A. I don't know. Not exactly.

Q. You, yourself, as an employee, drew the inference he disapproved of the unions, didn't you?

A. Yes.

Q. And from what he said to you?

A. Yes.

Q. What about Mr. William Garmon? Did he make the same statement in substance to you as to his views?

A. He did not.

Q. Did he indicate to you in any way so that you drew the inference he disapproved of the labor unions?

A. No.

Q. So it was only Max and Stewart that indicated they disapproved of the labor unions?

A. Yes.

[fol. 105] Q. Now when did you first learn, after the employees had voted and decided to leave the question of union membership up to management, that there would be an increase in pay?

A. When I got my check.

Q. You weren't told about it at all by either Max, Stewart or William?

A. No.

Q. Do you know whether or not—withdraw that. Were you present when they told any other employees they were going to get a raise?

A. No.

Q. Before you got your check giving you the increase in pay had you heard from any one of the three Garmon partners that there was to be a picket line on the establishment?

A. I don't remember.

Q. When did you first hear from one of the three Garmon partners that there was to be a picket line on the establishment?

A. We heard it a couple of times that there would be one there Monday morning and it didn't show up and finally it came around about a week later, Tuesday morning.

Q. You had been hearing two or three weeks before that there would be a picket line?

A. Yes.

[fol. 106] As a matter of fact, after this conversation of April 6th when Mr. Max Garmon was present and when you told the members of the labor union that the employees had decided not to join the union, Mr. Max Garmon told you, "We will probably have a picket line around the place before the week is out", didn't he?

A. I understand him to have said he would have to do

it the hard way. I don't know what else he said in that regard.

Q. I am asking about what Mr. Max Garmon said to you after the union representatives left. Wasn't it in substance, "We will have a picket line around the plant before the week is out"?

A. I don't remember.

Q. When did Max Garmon first say to you, "We will have a picket line"?

A. I just heard it in general conversation around there.

Q. From whom?

A. I don't remember who it was. It could have been any one of the three of them, or someone else. I don't write these things down in my little notebook.

Q. You do keep a notebook, do you?

A. Yes.

The Court: It is 3:30, Mr. Whelan. We will take our afternoon recess at this time. You may step down.

[fol. 107] Mr. Todd: Did you say how long, your Honor?

The Court: Fifteen minutes.

(Recess.)

The Court: Gentlemen, I probably should tell you I will be able to hear this tomorrow and then Wednesday I have the Law and Motion. I will be able to hear you Thursday, but you will have to finish it. If you don't finish on Thursday during the daytime, we will have to go until you finish because I won't be here Monday. I will be gone for two weeks.

Mr. Whelan: I think we will finish on Thursday if we go tomorrow and Thursday.

Mr. Todd: I should think we might finish tomorrow.

Mr. Whelan: Perhaps, but I am not going to make any rash statements.

The Court: Apparently Mr. Todd doesn't know Mr. Whelan. You may proceed.

JACK RUTLEDGE, recalled as a witness for and in behalf of the plaintiffs, and having been previously duly sworn, resumes the stand and testifies as follows:

Further cross-examination.

By Mr. Whelan:

Q. Mr. Rutledge, do you remember at this meeting of the employees where Mr. Collins read this proposed agree-
[fol. 108] ment to the employees and after the questions had been asked back and forth by all concerned that Mr. Collins asked each of the employees individually if he wanted to become a member of the union and pointed to him as he asked each individual?

A. I don't remember that. I don't believe he did, to the best of my knowledge.

Q. Now referring to this man that you called Brown, or you thought was Brown, do you remember meeting him a few years ago when he was working in the American Mill Factory?

A. Yes.

Q. You were introduced to him by Mr. Mark Tweed?

A. Yes.

Q. And Mr. Tweed was formerly the foreman of the Valley Lumber Company?

A. That is right.

Q. And this man that you thought was Mr. Brown you now remember as Mr. Al Packard?

A. Yes.

Q. You used to go down to that American Mill factory two or three times a week, did you not?

A. Yes.

Q. And you became very well acquainted with Mr. Packard?

A. I knew him to speak to him. When we were there
[fol. 109] we chatted once in awhile.

Q. Did you ever talk to him about the union to which he belonged and the conditions he was working under?

A. Not that I remember.

Q. Did you ever ask him if his union would send a representative to the Valley Lumber Company to talk to the men?

A. I did not.

Q. Now do you remember talking to him about a couple of years ago when he and Mr. John Lyons of the Teamsters', Local No. 36, were out at the Valley Lumber Company?

A. I remember talking to him. I don't know who the other fellow was.

Q. A big, husky, good-looking fellow?

A. I wouldn't say. I don't remember at all.

Q. At that time didn't you tell them that you thought all of the employees of the Valley Lumber Company would like to join the union with the exception of a man they called Tex?

A. No, I don't believe I did.

Q. Did you ever call Mr. Packard on the telephone and ask him to have a representative of the union come out and talk to the employees of the Valley Lumber Company?

A. I have not.

Q. Now you said something about the automobiles being parked out there across the street from the Valley [fol. 110] Lumber Company?

A. Yes.

Q. They stay on a public highway?

A. It was on the property across the street.

Q. Not on the property of the Valley Lumber Company?

A. No, sir.

Q. Was it on the property across the street or on the roadway in front of the property across the street?

A. Both at times.

Q. You only saw there one car at a time, isn't that so?

A. No, it is not.

Q. How many cars did you see there at one time?

A. I have seen four at one time there.

Q. How many occasions?

A. Several. I don't know just how many.

Q. You don't recollect any of the conversation that took place between Mr. Garmon and Mr. Collins and Mr. Taylor and Mr. Packard on Monday, April 6th, when you were called in to notify the union representatives that the employees did not want to join the union?

A. I was never present in the office at the time that was talked about.

Q. On your direct examination you testified that when

you were called in to tell the representatives that the employees did not want to join the union, that they stated [fol. 111] that they had the impression from the meeting that had taken place that the employees did want to join the union?

A. We talked about both sides of it.

Q. I mean on your direct examination, do you remember saying this: That they stated they got the impression at the meeting that the employees did want to join?

A. I believe that is what Mr. Collins said.

Q. Then you made a statement to Mr. Collins "We changed our minds"?

A. Something like that. It might not have been worded exactly like that.

Mr. Whelan: I believe that is all.

Redirect examination.

By Mr. Archer:

Q. On direct examination, Mr. Rutledge, I asked you to state what Mr. Bill Garmon said to you when you came in and reported to him the outcome of the first meeting. Will you now relate to the Court what Mr. Garmon said to you when you told him the men decided to leave it up to the partners?

Mr. Whelan: That is objected to on the grounds it is improper redirect examination, calls for hearsay and is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. He said that he couldn't make the decision for us; that we would have to do that ourselves.

[fol. 112] By Mr. Archer:

Q. Now Mr. Whelan was asking you some questions about when you heard that there was going to be pickets placed on the yard. How did you hear that there were to be pickets?

A. Well, I don't remember exactly. In various ways. I do know that some of the carpenters came in and said that there would be pickets at such and such a time.

Mr. Whelan: I move to strike that on the grounds it is hearsay and no proper foundation laid. "Some of the carpenters" is not binding on the union involved here.

The Court: Overruled.

By Mr. Archer:

Q. Were they, some of them, members of these unions?

Mr. Whelan: That is objected to on the grounds no proper foundation laid, calls for a conclusion and opinion.

The Court: He may answer if he knows. Do you know?

A. Yes.

By Mr. Archer:

Q. How long prior to the pickets' actually being placed on the plant did you first begin to hear that they were going to be placed on the company yard?

A. Would you repeat that question?

Q. To the best of your recollection, how long was it before the pickets actually arrived on April 28th that you first began to hear that they were going to be there?

[fol. 113] A. I believe about two weeks.

Q. Did you hear that from more than one source?

A. Oh, yes.

Q. Well, can you describe how many or approximately how many, or whether it was generally known?

A. It seemed like everyone that came in the yard told us about it.

Mr. Whelan: I move to strike that on the grounds it is a conclusion and opinion and no proper foundation laid for the answer. It calls for hearsay and it is hearsay.

The Court: No, I don't think it is hearsay. He can state whether it was from many sources or one.

A. It was from many sources.

Mr. Archer: I have no further redirect examination.

Recross-examination.

By Mr. Whelan:

Q. By the way, do you know anything about an ad that appeared in the paper at Escondido purporting to have been signed by the employees of the Valley Lumber Company?

A. I know all about it.

Q. Who put that ad in the paper, do you know?

A. The employees.

Q. Who paid for it?

A. The employees.

Q. How much did the employees pay for the ad?

[fol. 114] A. I don't remember right off hand what it was now.

Q. Who got the employees to get together and prepare the ad?

A. One of the men thought it would be a good idea and he had the bookkeeper there write it up so that it would be worded nice.

Q. Which man?

A. Cecil Welch.

Q. What are his duties?

A. He works in the office.

Q. Cecil Welch is the supervisor, is he not, in the office?

A. I have never heard him called that, no.

Q. What are his duties?

A. He waits on customers and extends the tickets, and what have you.

Q. Extends the what?

A. Extends, checks the tickets, and what have you. That is the best way I can explain it.

Q. He was not present at the employees meeting when Mr. Collins spoke to the employees, was he?

A. No.

Q. And who works in the same office with Mr. Welch?

A. The office is altogether there.

Q. Well, who works in the office?

A. Stewart Garmon, Max Garmon, Bill Garmon, the

[fol. 115] bookkeeper and Mr. Welch.

Q. Who is the bookkeeper?

A. Mrs. Hoesle.

Q. How do you spell her name?

A. I am not sure. H-o-e-s-l-e (spelling), I think.

Q. And the ad stated, in effect, "We are not on strike. We don't want to join the union"?

A. Absolutely true.

Q. That is what it said?

A. That is what it said.

Q. And that was prepared in the office of the Valley Lumber Company?

A. It was not.

Q. Where was it prepared?

A. Out in the lumber yard.

Q. You said that Mr. Welch originated the idea and Mrs. Hoesle prepared it?

A. After we looked it over.

Q. Anyway, it came from—as a result of the suggestion made by Mr. Welch?

A. Yes.

Q. Now were you present when Mr. Max Garmon made the suggestion to Mr. Welch that the employees ought to put in such an ad?

Mr. Archer: To which I object on the grounds it is assuming something not in evidence.

[fol. 116] Mr. Whelan: It is cross-examination.

The Court: I will sustain the objection.

By Mr. Whelan:

Q. Did you hear Mr. Max Garmon discussing with Mr. Welch the placing of such an ad in the paper?

A. No, I did not.

Q. Now how was this ad paid for?

A. By the employees.

Q. Well, now, what paper was it printed in?

A. The Times Advocate.

Q. Was it paid in cash or by check?

A. Paid in cash, I suppose.

Q. Did you have anything to do with placing it in the paper?

A. No, I did not.

Q. Who placed it in the paper?

A. I think Mr. Welch did.

Q. Did he pay for it in cash or by check?
A. I don't know.
Q. Well, was a contribution taken up from the employees to pay for the ad?
A. Yes.
Q. Were you present?
A. No, I was not.
Q. You didn't contribute anything to it, did you?
A. I didn't.
[fol. 117] Q. Do you know how much the other employees contributed?
A. No, I don't.
Q. You don't know whether this advertisement was paid for by the management of the Valley Lumber Company, do you?
A. I don't.

Mr. Whelan: I think that is all.

Mr. Archer: I have no further questions. You may step down. Call Mr. Max Garmon. Your Honor, I might state that this Mr. Garmon contracted something that is comparable or exactly like laryngitis over the weekend and he has been told not to talk any more than he has to, but I think if he will take that microphone up close to him he won't have to talk very loud.

MAX GARMON, one of the plaintiffs herein, called as a witness for and in his own behalf, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Archer:

Q. Please state your full name?
A. James Max Garmon.
Q. Where do you reside?
A. Escondido, California.
Q. Are you one of the partners of the Valley Lumber [fol. 118] Company?
A. Yes.
Q. Prior to April, 1953, had you had many dealings with

the representatives of the unions that were attempting to obtain a contract from your company?

A. No, not primarily. Bill was handling it up until the time he left. I talked to them just in passing, mostly.

Q. Then about the time that your Uncle Bill had to leave town did you pick up the discussions with the representatives of the union?

A. Yes.

Q. Approximately when was your first meeting with them?

A. 6, April.

Q. Who was present at that meeting?

A. Mr. Collins, Taylor and Packard, I believe it is.

Q. To the best of your recollection, will you tell us what was said by them and what was said by you and the result of that meeting?

A. Well, they came into the office and we—they asked me if we had reached a decision. I said that the men had decided not to join and we did not feel in a position of forcing the men. I asked them if they would like to talk to Jack. I had told him to stay in the office when they did come so they could talk to him. He was asked the same question and he told them that the men had decided not to [fol. 119] join. We discussed, oh, general topics somewhat. I told them at that time that I wouldn't sign it for a thousand dollars on general principles to force any man into an organization in order to work, and they asked me if I would for ten thousand and I said, "I guess every man has a price". They indicated they would make it cost me ten thousand.

Mr. Whelan: What was that last?

(The record read by the reporter.)

Mr. Whelan: Move to strike that on the grounds it is a conclusion and not a statement of fact.

The Court: May be stricken. You can reframe it.

By Mr. Archer:

Q. Was anything said by Mr. Taylor, Mr. Collins or Mr. Packard on that subject, about what it would cost you?

A. Mr. Taylor, I believe, was the one that said, I believe, "We will see if we can't make it cost you that much."

Q. Was there anything in the way of additional conversation before that meeting broke up?

A. I tried to get them to work on one of the other yards to get them off our back. They finally said they guessed they would have to do it the hard way and they left. I also offered to let them go talk to the men at that time and sign any of them up that they could.

Q. What happened next, so far as you are concerned?

A. Well, we kept getting rumors after that that the [fol. 120] picket was coming next Monday; everybody should get their materials out before then. I had no direct conversation with no representatives of the unions, so far as I know.

Q. What was the next thing that happened?

A. The picket line, the 28th of April.

Q. What effect has that had on your regular course of business?

A. Well, it has been very difficult to operate. We have had to work some after hours, taking in materials, that came after the picket would leave. Some contractors come very early and we make some deliveries very early and some late in the evening, in order to avoid getting the union people in Dutch. Most of them are quite fearful.

Mr. Whelan: Move to strike that on the grounds it is conclusion and opinion and hearsay.

The Court: Overruled.

By Mr. Archer:

Q. Are your regular customers doing business with you in the customary and normal manner?

A. No, not in a normal manner. We still sell our regular customers, but during the day it is too inconvenient ordinarily for them to go to a telephone and call us and we have to take the materials to one of the other yards, perhaps, and have it delivered, and it is not a normal, easy way to do business, no.

Q. Do you have a record of some, if not all, of the [fol. 121] pick-ups and deliveries that have been made at other points?

A. Yes, I have a record of many of them; not all of them.

Q. I have handed you some notes on yellow note paper,

apparently note pads of the John Mansville representative, and I will ask you to tell us how many deliveries you have recorded there as having been made at yards other than your own?

Mr. Whelan: That is objected to as immaterial, what he has recorded there.

The Court: I beg your pardon?

Mr. Whelan: What he has recorded there is immaterial. His testimony as to the deliveries is the important thing I think.

The Court: He can look at it and see if it refreshes his recollection.

By Mr. Archer:

Q. You may look at your notes and then you may testify after refreshing your recollection as to how many deliveries were made at other yards.

A. Approximately 27, I have written down here, both pick-ups and deliveries.

Q. And have you kept a record as this went along of the number of extra man-hours that have been consumed in following this abnormal practice?

A. I have tried to.

[fol. 122] Q. What was the total increased man-hours?

Mr. Whelan: That is objected to on the grounds it is incompetent, irrelevant and immaterial and a very vague and uncertain question and based upon his conclusion that he tried to keep a record.

The Court: Overruled.

A. I wrote down what I could. I am not there all the time. One day a week I am gone. It is approximately 70 man hours and approximately 30 truck hours.

By Mr. Archer:

Q. Now what was the cost of those extra man hours?

A. Well, I put down two and a half. I think that is a minimum.

Q. What was the cost of the truck hours?

A. $3.00 an hour.

Q. What have you observed with respect to the interference with or disturbance of your business? Will you relate chronologically what incidents you have observed at or about the yard or wherever your trucks may have been going to attempting to go, perhaps I should say?

Mr. Whelan: That is objected to on the grounds it is a little ambiguous. I don't mind leading questions but it is complicated even for the witness, I think.

By Mr. Archer:

Q. I said for him to give in chronological sequence the description of the incidents he has observed in the [fol. 123] disruption of the business during this period?

A. Can I use these notes?

Q. You may use those to refresh your recollection. Are those kept in your own handwriting as a log of what you observed transpiring?

A. Yes, they are all in my own handwriting. No, some are in Bill's and some my Dad's and some in the bookkeeper's.

Mr. Whelan: We object to that document as a means of refreshing his recollection.

The Court: He can use those in his own handwriting.

A. Friday, May 1, Pine Tree Lumber delivered plywood to J. C. Penny's for us. Do I have to name the people involved in this? Some of them may not desire to be brought into it.

Mr. Archer: You may simply—I beg your pardon.

The Court: I was going to say if your counsel asks for this information specifically I think the other side would be entitled to know the parties.

Mr. Archer: I didn't know you had that.

Q. Will you state for the record just generally what observations you have made with respect to the interruptions or disruptions, if any, of deliveries to the yard or pick-ups or whether or not any trucks have been followed, or anything of that nature?

A. Starting on the first day of the picketing, it was

April 28th, they stopped all contractors either coming in or [fol. 124] when they were going out of the yard.

Mr. Whelan: Just a minute. I will object to that on the grounds it is conclusion and opinion. He says they stopped all contractors.

The Court: Did you see them?

A. Most, or many.

The Court: You can tell us if you saw any of them.

A. Yes, sir.

The Court: Go ahead.

A. They also followed our trucks on jobs. We were first forced to take down our back fence for delivery out the back way. We had to go into Pine Tree and unload it onto their trucks, and we went into the Escondido Lumber and had them deliver some for us. This continued and the first day we did get some delivery of materials but they stopped some of those trucks coming in and some of them, after they had been in, they didn't come back any more. So thereafter we picked up all of our materials at one of our competitor's yards. Also for any pick-up trade of our general contractors we had to deliver it either by automobile or in one of the trucks, items that normally they would come in to pick up. They also didn't bring in estimates because they couldn't, in their normal day's work, come into our place. We lost contact with them somewhat unless we actually went out on the job. We did not see the contractors or any union personnel. After we got the first restraining order [fol. 125] I personally followed one of the cars in which Mr. Taylor and Mr. Packard followed one of our trucks going to a job of a Mr. Herman Thorea and at the point I intercepted the truck, Mr. Taylor and Mr. Packard, they had made several turns, which was conclusive evidence they were definitely following the truck.

Mr. Whelan: Move to strike that on the grounds it is a conclusion.

The Court: May be stricken.

By Mr. Archer:

Q. Just state what you saw and what you observed them do and, of course, any conversation you may have had with Taylor, Collins and Packard, if you had any.

A. We had a Marolite deal by a man by the name of Arnold Swanson from Riverside who was turned away from our yard. They also followed—he was also followed by one of the cars parked across the street.

Mr. Whelan: If the Court please, I want to move to strike the testimony of the witness that Arnold Swanson was turned away.

The Court: Did you see him?

A. Yes, sir, and I have an affidavit to that effect.

The Court: You may testify.

A. They followed him to the corner and asked him to see his union card. He was an owner-driver of the truck and had no union card and later told me that——

[fol. 126] By Mr. Archer:

Q. You can't tell us what he told you. That would be hearsay.

A. He called me on the telephone and said he couldn't get in——

The Court: Don't tell us what he told you.

Mr. Whelan: I move to strike all that as hearsay.

The Court: There hasn't been any in.

A. He didn't come back to the yard—I mean, he did come back to the yard. He turned around in the yard the second time and left. I then went over to Escondido Lumber Company in the automobile with my bookkeeper and I also had a truck meet us there to receive our supplies, at which time we took an affidavit from Mr. Swanson.

By Mr. Archer:

Q. Let me get the timing on that. You say it was after the restraining order issued by this Court on May 7 that you observed Mr. Taylor and Mr. Collins——

A. Not Collins; Packard.

Q. Following your trucks?

A. Right. That was on 19 or 20, May.

Q. Have you or have you not been receiving dellveries in the regular course of business from Southern California Freight Lines?

A. We have not been receiving them in the usual manner.

We have had to pick up our items, most all items at their [fol. 127] terminal in Escondido. The Manager told me that he didn't dare——

Mr. Archer: Wait a minute.

Mr. Whelan: Move to strike that "Didn't dare" business.

The Court: May be stricken.

A. They have not delivered any materials to us.

By Mr. Archer:

Q. Have you received normal deliveries from Culy Freight Lines?

A. No, we have not received any deliveries to my knowledge from Culy Freight.

Q. Do they normally make regular deliveries?

A. Yes.

Q. Returning for a moment to this incident of the man, Swanson, when he first came to the yard, did you observe how and why he stopped?

A. Not the first time, no.

Q. When he proceeded on up to the service station and then returned, did you see why and how he stopped?

A. Yes.

Q. Will you describe that, please?

A. One of the men talked to him and he turned around, turning into the neighboring business, and knocking down electric wires. He was in such a position he couldn't hardly turn around.

Q. He backed around and went away then?

[fol. 128] A. Right.

Q. Do you recall an Ira Johnson job?

A. Yes.

Q. What happened with respect to that one?

A. We sent it out on a truck and it was followed and we got ahold of Mr. Johnson. He did not want us——

Q. You can't tell what he did. Just tell what happened.

A. We contacted Mr. Johnson. We did not deliver the materials on the job. We delivered them to Pine Tree Lumber Company, who, in turn, delivered them on the job.

Q. Do you recall a Gerald Baker attempting to come to the yard?

A. Yes. He did not come in. I saw him circle. I don't know that he talked to anyone, but I believe twice in the same day he drove——

Mr. Whelan: Just a minute. I move to strike what he believes.

The Court: Did you see him?

A. Yes, I saw him once positively.

By Mr. Archer:

Q. He drove up and did not come in?

A. That is right.

Q. How about the Western Metal Supply Company deliveries?

A. He drove up to the yard—I had a customer at the [fol. 129] time; and he did not ever come in. As a matter of fact, to the best of my knowledge, we did not receive our materials that week from Western Metals.

Mr. Whelan: I move to strike that as a conclusion and opinion and not a statement of fact.

The Court: May be stricken.

By Mr. Archer:

Q. I do not recall if I asked you about the Cob Sash and Door Company. Have you been obtaining deliveries from them?

A. No, we have not.

Q. What was the situation with respect to deliveries by U. S. Plywood Company?

A. They have not made any deliveries but one and on that occasion the driver went out when he later found out about the picket, he went out and talked to them.

Q. Do you recall any incident of a car going to a Housen job?

Mr. Whelan: Objected to as leading and suggestive, if the Court please.

The Court: Overruled.

Mr. Whelan: Counsel is reading from the book the wit-

ness used to refresh his recollection. I assume we will be granted the privilege of looking at the same book.

Mr. Archer: He did not use it, Counsel.

Mr. Whelan: He did so.

[fol. 130] Mr. Archer: No, I withdrew it.

Mr. Whelan: You took it out of his hands after asking him a couple of questions.

The Court: Counsel has the right to ask him if he recalls any particular job.

By Mr. Archer:

Q. Was there any incident within your recollection connected with a Dwight Housen job?

A. Dwight Housen's men are non-union. Our truck was followed out there on the job. All I know about it is hearsay.

Mr. Archer: You can't tell that.

Mr. Whelan: I move to strike his testimony then that the truck was followed out on the job.

The Court: May be stricken.

By Mr. Archer:

Q. I am sorry. You didn't see the——

A. (Nods head negatively.)

Q. Has there been any change in the operations of the pickets and the other representatives of the unions that operate these automobiles that park around your place since the granting of the temporary injunction in this matter on May 20th?

A. No, sir.

Mr. Whelan: That is objected to on the grounds it calls for a conclusion and opinion of the witness.

[fol. 131] The Court: Overruled.

A. No, sir.

By Mr. Archer:

Q. Can you identify any of the men in the room here as being men who operated these cars that followed your trucks?

A. Yes, some.
Q. Who are they?
A. Mr. Taylor and the gentleman next to him. I have forgotten his name.
Q. Aust?
A. Aust, and Packard. That is all I see right now that I recognize for sure.
Q. Have they been out around the picket line?
A. Yes.
Q. Has Mr. Collins been out around the picket line?

Mr. Whelan: Objected to as leading and suggestive.
The Court: Overruled.

A. I beg your pardon?

By Mr. Archer:

Q. I asked has Mr. Collins been out on or around the picket line?
A. No, not that I know of.
Q. I am sorry. I didn't get the last part of that.
A. Not that I know of.

Mr. Archer: You may cross-examine.

[fol. 132] Cross-examination.

By Mr. Whelan:

Q. Did you see Mr. Taylor following any trucks to any jobs?
A. Yes.
Q. Which ones?
A. Mr. Herman Thorea's.
Q. Any other jobs?
A. That is the only one I saw him on, following.
Q. Did you see Mr. Aust following any truck to any jobs?
A. No.
Q. How about Mr. Packard?
A. Yes.
Q. Which ones?
A. The same as Mr. Taylor.
Q. The Thorea job only?

A. Right.

Q. What date was that?

A. I believe it was 20, May.

Q. When you say "20, May", you mean May the 20th?

A. Yes.

Q. How many union representatives other than Mr. Taylor and Mr. Packard, who you say followed a truck to the Thorea job, have you seen following your trucks to any job?

A. During the first week I did, but specifically I [fol. 133] can't name the men.

Q. What do you mean the first week?

A. Well, the picket was on in two courses, starting April 28 to the 7th of May. During that period of time.

Q. All right. During that period of time what union representatives did you see following one of your trucks to any job?

A. I said I could not identify them, any men.

Q. Well, what job can you identify any union men following your trucks to?

A. Mr. Ira Johnson's, a job on, I believe it is Fourth and Escondido Boulevard.

Q. Let's take it slower. What date did you see any union men following a truck to Ira Johnson's job?

A. I don't believe that was the question you put to me, sir, before.

Q. Well, we were talking about the period of time from April 28th until May 7th. That is the first section of the picketing you referred to.

A. Yes.

Q. During that time what job of yours did a union representative follow a truck to?

A. Well, I previously said I could not identify. I then misunderstood you, evidently, and I was going to tell you what jobs I knew they had been on while we were trying to deliver materials.

[fol. 134] Q. Let's take it piece meal and confine it to the period between April 28th and May 7th.

The Court: Mr. Whelan. May I interject? What is the difference whether it is between that period or the next period? They were enjoined, excepting for the purpose of having the picket out there, weren't they? Were they permitted to follow these trucks, and so forth? Were they enjoined against that by Judge Turrentine?

Mr. Whelan: Well——

The Court: If they were enjoined from that, what is the difference whether it was in the first instance or the second one?

Mr. Whelan: Among other things I am testing this witness's recollection, but counsel has laid the implication that the union representatives violated some order of the Court and I want to get specific.

Mr. Archer: I hope it was not implication. I hope I established it by evidence.

The Court: I am just saying this, in the first instance they were enjoined absolutely and then Judge Turrentine modified it so they could have their picket, but I understand they were still enjoined from following these trucks.

Mr. Archer: That is right.

The Court: So if he can't differentiate between what days it was, what is the difference?

Mr. Whelan: It perhaps may develop as a result of the [fol. 135] cross-examination that he didn't see any trucks being followed.

The Court: But what was the date of the one where Judge Turrentine modified it?

Mr. Archer: May 20th.

The Court: If he got confused as to whether it was the 18th or 20th, what difference would it make?

Mr. Whelan: I don't know whether he is confused or not.

The Court: I don't think it is fair to the witness to pick out whether it was the 20th or the 18th. If they were both illegal it doesn't make any difference.

Mr. Whelan: I know, but your Honor, I think, assumed that there was some illegality about any act of these union representatives and I want to eliminate——

The Court: I wouldn't say following these trucks was a part of the educational program. If you are entitled to put a picket out there to tell the people the plans under a picket, I don't think part of that educational program goes to following these trucks and contacting other people and advising them not to deal with the company.

Mr. Whelan: I know, but I think, if your Honor please, and I respectfully urge that I am entitled to find out and if I can eliminate some portion of the time——

The Court: No, you may inquire if it was between the

time the original injunction was granted, or the restraining order, and the period when the modification was in effect. [fol. 136] It doesn't make any difference, as far as I can see.

Mr. Holt: May I intercede for a moment? I think there is something wrong about the dates. Mr. Whelan asked about a period before there was any injunction. There wasn't any injunction from April to May 7th. The witness said he wasn't sure about it.

The Court: Well——

Mr. Holt: The witness so states.

Mr. Archer: It is not the witness's fault.

Mr. Holt: I didn't say it was. I say there is confusion as to dates here.

The Court: I understand from the questioning here it was when the original injunction was on and when the modified one was on. It doesn't make any difference to me whether it was one or the other. If it was before that, that is one thing, but if it was in between both of them, it doesn't make any difference.

Mr. Whelan: Well, conceding all that is true, I am trying to pinpoint the times he claims he saw some people following his trucks. If we can eliminate the period before May 7th, between April 28 and May 7th, fine and good, or if it happened during that time that is all right, too. Then take him from that time up to May 18th.

The Court: The 7th was the date when the original was granted?

Mr. Archer: Yes, sir.

[fol. 137] Mr. Whelan: Yes, but I think we shouldn't have to discuss all these things and sort of brief the witness.

The Court: I am not trying to do that.

Mr. Whelan: No, but that is the effect of it.

The Court: You can inquire as to dates, whether it was before or after. Proceed.

By Mr. Whelan:

Q. Do you recall now seeing any of the union representatives following any of the trucks between April 28th and May 7th?

A. Not that I can recall off hand.

Q. Let's take the period from May 8th of 1953, which

I believe fell on a Friday, between that date and Monday, May 18th. Do you recall seeing any of these individuals following any of your trucks to any of your jobs?

A. No, I did not see them.

Q. You did not see any between May 8th and 18th?

A. (Nods head affirmatively.)

Q. Now when was the first date that you did see one of these union representatives following one of the company trucks?

A. It was either the 19th or 20th of May.

Q. That was when you saw Mr. Taylor and Mr. Packard in an automobile after one of your trucks had been dispatched to the Thorea job?

A. That is right.

[fol. 138] Q. As a matter of fact, that is the only truck of your concern that you actually saw being followed by any representatives of these unions, isn't that so?

A. That is all that I can definitely pinpoint.

Q. And whereabouts did you see Mr. Taylor and Mr. Packard in this automobile when your truck had been dispatched to the Thorea job?

A. Well, I saw them at the end of Grand Avenue, the east end of Grand Avenue, where you get on the San Pasquale Road. Our truck left going east on Grant Avenue, turned right on Broadway, then turned left on Grand for approximately a mile. Our truck left and I saw Mr. Taylor and Mr. Packard jump in their car and leave. Mr. Welch and I jumped in my car and we went a different route and parked at the end of Grand Avenue where it intersects the San Pasquale Road and the truck came by and about 150 yards behind was Mr. Taylor and Mr. Packard.

Q. Did you see Mr. Taylor or Mr. Packard in conversation with the driver of your truck?

A. No, I didn't.

Q. Did you see Mr. Taylor or Mr. Packard in conversation with any customer of yours that day?

A. No, I did not.

Q. Did Mr. Taylor or Mr. Packard impede the progress of your truck?

A. Not to my knowledge.

[fol. 139] Q. Within your vision did Mr. Taylor or Mr. Packard stop your truck?

A. No, they did not.

Q. Now, Mr. Garmon, I understood you to say something to the effect that right after the meeting that you had on April 6th, 1953, which was a Monday, where you called Mr. Rutledge in to notify the union representatives that the employees had decided not to join the union, that rumors began to fly around about a possible picket line?

A. Yes.

Q. I believe that you testified that a lot of contractors who had material at your place got the material out during the month of April, is that right?

A. They were told to. Whether they did——

Mr. Whelan: Move to strike that as not responsive.

The Court: May be stricken.

By Mr. Whelan:

Q. Pay attention to the question, please. It was your testimony, was it not, that after this meeting of Monday, April 6th, 1953, there were rumors that there would be a picket line and that a number of contractors who had material in your place got the material out during the month of April?

A. There wasn't any particular stock piling of that that I am aware of, no.

Q. Didn't you say that a number of contractors got [fol. 140] their material out of your yard during the month of April.

A. What I believe I said was that they had been told to get it out before Monday morning, if they wanted to get any out.

Q. Who told them out?

A. They told me the union told them that.

Q. As a consequence they did get their materials out of your establishment during the month of April?

A. They didn't particularly rush about it, no, sir.

Q. They just came in in their own sweet time and got the material out?

A. I guess they figured they would get it somewhere else if we couldn't.

Q. Didn't your sales during April greatly exceed those of March, 1953?

A. I don't have the books here, but I don't think so.

Q. Among other things, we were to have some records of sales for April and May, 1951, and April and May of 1952, and April and May of 1953. Could we likewise have tomorrow morning the record of sales for March of 1951, 1952 and 1953?

A. Yes.

Q. Now getting back again to your dealings with the union. You say you didn't have very much to do with any dealings with the unions for the Valley Lumber Company until after your Uncle Bill had been called to Orange County because of some illness in his family?

[fol. 141] A. That is right.

Q. So your first meeting with any representatives of the unions was on Monday, April 6, 1953?

A. Other than just casual conversation, yes.

Q. But the first talk that you had with them about any business of the Valley Lumber Company was on Monday, April 6th?

A. Right.

Q. Who was it that came to your office on that day?

A. Mr. Taylor, Collins and Packard.

Q. When they came in there who opened the conversation, Mr. Taylor, Mr. Collins, you or Mr. Packard?

A. I haven't the slightest idea.

Q. What was that?

A. I haven't the slightest idea.

Q. Well, do you remember what you first said to Mr. Collins or Mr. Taylor?

A. No, sir, I don't.

Q. Well, do you remember making this statement to them, to the three of them, that you had had a discussion with the employees and that they had all signified they had no desire to become members of the union?

A. To that effect, yes.

Q. And didn't you tell Mr. Taylor and Mr. Collins and Mr. Packard that you had told the employees that they were free to join the union or not, that it wouldn't affect their [fol. 142] jobs either way, but that as far as you were concerned you wanted no part of the union?

A. I didn't say that.

Q. What did you say?

A. Well, it was over a period of questions. I think I did tell them that it would not affect their jobs in any way, that if the men wanted to, we weren't going to invite it, but I told them that I had not coerced the employees in any way and I don't recollect exactly how it was arrived at, but I said, "I suppose the men know I am personally not union minded and I suppose almost everybody I know knows I am not personally union-minded".

Q. That is what you told Mr. Taylor and Mr. Packard and Mr. Collins?

A. That is right.

Q. And you have made no secret that you don't sympathize with the unions, is that right?

A. No, that isn't true. I am not a union man myself and I personally would not join, but I did not try to interfere in any way with their decision.

Q. You told Mr. Taylor and Mr. Collins and Mr. Packard that you supposed that everybody knew you were not union minded?

A. I suppose so, yes.

Q. And when you say you suppose everybody knew you were not union minded, did you intend to refer to the [fol. 143] people of Escondido as knowing that you were not union minded?

A. Well, friends of mine, yes.

Q. You, as a matter of fact, told the employees that they could join the union or not, as they saw fit, but that personally you didn't favor unions?

A. Well, to straighten it up a little bit, I had not actually talked to more than about two of the men about it, Jack being one of them, and I think one other. Bill had carried on the conversations with them.

Q. Didn't you tell the ones you did talk to you did not favor unions?

A. No, I don't think I ever said that.

Q. And you don't think you told Mr. Taylor specifically this, Mr. Collins and Mr. Packard being present: That you had told the employees, the men, that they could have their jobs irrespective of whether they joined the union or not; it was up to them, but that you personally had no use for unions?

A. No, that wasn't what I said. I told them that I am

sure that the men know my personal convictions about it, although I did not tell them my personal convictions.

Q. Your personal convictions were that you did not care to have anything to do with the unions, isn't that right?

A. Well, more or less, yes. That is stronger than I put it, but I would prefer not to.

[fol. 144] Q. After you made the statement that you say you made didn't Mr. Taylor ask you this question: "Did you inform the employees as to how you feel about unions?" And didn't you reply in substance that you did inform the employees as to how you felt about unions and that you told the employees that you personally did not care to have anything to do with the unions?

A. No, I don't believe that is a fact.

Q. You didn't say that even in substance?

A. No. Because in the first place I have not talked to all the men personally.

Q. I am not asking you that. I am asking you if you made that statement to Taylor in the presence of Collins and Packard?

A. I don't believe so.

Q. What did you say in that regard?

A. Well, as I previously stated, I told them that I had assured the men that whatever their decision was it would be all right with us, but I also added, I said, "I am sure they probably know how I feel personally, but we are not going to interfere with them one way or the other". As a matter of fact, if the men had signed up we would have gone.

Q. When did they get the raise in wages with reference to the time that you told Mr. Taylor that the employees did not want to become members of the union?

[fol. 145] A. I do not know, sir. Bill handled the payroll and I really don't know exactly.

Q. You don't know then, I suppose, when they got the raise with reference to the time there were rumors there would be a picket line on the job?

A. No, I don't know exactly when that came in.

Q. When you had that conversation with Mr. Collins and Mr. Taylor and Mr. Packard, wasn't it pointed out to you that other lumber companies in Northern San Diego County had entered into contractual relations with the union and

they were hopeful there would be some negotiations with your company?

A. I suppose so, something to that effect.

Q. Didn't you say at that time, "Well, if it costs me a thousand dollars a year I would rather stay out of the union"?

A. No, that isn't what I said. I said I wouldn't sign if he would hand me a thousand dollars, and sign a man's rights away, force my men to join.

Q. But didn't you then say, "If it cost me a thousand dollars a year I wouldn't join the union, but if it became a matter of $10,000 I might feel differently"?

A. Yes, that has been——

Q. You did say that?

A. Yes, I did. This conversation wasn't any—I mean, it was just a normal conversation between them and us.

[fol. 146] Q. You weren't shouting at each other; it was more or less friendly?

A. Yes, and those were asides that were added sometimes.

Q. And as a matter of fact, when you left, or when they left, rather, you shook hands all around and everything was friendly?

A. I don't remember that.

Q. You don't remember shaking hands with them?

A. No. Perhaps we did. I just don't know.

Q. Now on your direct examination you testified that you had made the statement in substance that you wouldn't sign the contract for a thousand dollars, then I believe you said that one group asked you if you would sign it for $10,000 and you replied, "Well, any man has a price".

A. That is true.

Q. Then you went on to say that Mr. Taylor said to you, "Well, we will see if we can't make it cost you that much"?

A. That is right.

Q. Actually, Mr. Taylor didn't make that statement to you; what you said was that you wouldn't sign for a thousand dollars but if it cost you ten you might, then didn't Mr. Taylor say this: "Are you setting a goal for us to shoot at?" And then didn't you all laugh and shake hands and they departed?

A. Well, in the first place I mentioned the thousand

[fol. 147] dollar figure; I didn't mention the $10,000 figure. But that in substance is more or less correct.

The Court: Mr. Whelan, it is five o'clock. We will adjourn until tomorrow morning at ten. Now these records that are supposed to be brought in, I hope you bring them so we can proceed early. I will try to get back early, as quickly as I can. I have to go to the Psychopathic Department. I feel certain I will come out all right. But I will try to be back about a quarter to ten. We can start in as soon as I get back.

(Court was adjourned at 5:00 P. M.)

[fol. 148] *San Diego, California, Tuesday, June 2, 1953, 10:00 A. M.*

The Court: Garmon against San Diego Building Trades Council.

Mr. Todd: Ready.

Mr. Whelan: Ready, your Honor.

Mr. Archer: You are cross-examining.

MAX GARMON, one of the plaintiffs herein, recalled as a witness for and in his own behalf, and having been previously duly sworn, resumes the stand and testifies further as follows:

The Court: Is Mr. Holt going to be here this morning?

Mr. Whelan: He was here, your Honor, and just stepped down the hall. He wants us to proceed without him.

The Court: O. K.

Further cross-examination.

By Mr. Whelan:

Q. Mr. Garmon, after the picket line had been established out there you said that you had some difficulties in that it was necessary for those who supplied you with merchandise to leave the merchandise at some place else and then you had to pick it up?

A. That is true.

Q. And then when you were making deliveries you said

[fol. 149] that you left your delivery truck at some other yard and then you—it would be picked up at the other yard and then delivered on the job?

A. That is true.

Q. And that resulted in some inconvenience?

A. Much.

Q. Nevertheless, you were able to obtain supplies and make deliveries in the fashion you have indicated?

A. With delays, yes.

Q. Now about this man Arnold Swanson that you testified, did you hear any conversation that he had with any picket out there?

A. No, I did not.

Q. Did you see Mr. Swanson drive by your yard?

A. Yes, I did.

Q. Which direction was he traveling?

A. Traveling east.

Q. And——

A. The first time. That is the first time.

Q. Did you see him go by the first time?

A. Yes, I did.

Q. I thought I understood you to say yesterday you didn't see him when he went by the first time but you did see him when he came back the second time?

A. I said I did not see him waved on the first time, which he said he was waved on. I did see him pass as he was [fol. 150] about even with the office, continuing on east. He was past where the pickets and union representatives were when I saw him the first time.

Q. Then what did he do after that?

A. He called me.

Q. He called you before he passed the second time?

A. Yes.

Q. Then you said that he delivered the cement he was hauling——

A. Marolite.

Q. That is some sort of cement composition, is it?

A. It is a plaster aggregate.

Q. You say he delivered that to the Escondido Lumber Yard?

A. That is true.

The Court: Pardon me one moment, Mr. Whelan.

Mr. Whelan: Surely, your Honor.

(Off the record discussion between Court and Mr. Fern.)

The Court: You may proceed.

By Mr. Whelan:

Q. Now you said that he left that material at the Escondido Lumber Company?

A. Yes.

Q. How many different lumber companies are there in Escondido?

A. Three.

Q. And what are their names?

[fol. 151] A. Besides ourselves?

Q. What is that?

A. Besides ourselves. Pine Tree, Escondido Lumber and Hayward Lumber Company. There is one outside of town, about a mile or a mile and a half west.

Q. What is that?

A. Van's Lumber, I believe it is.

Q. Do you know whether or not Van's Lumber Company is a union yard?

A. I have heard rumors that it is; I do not know.

Q. How far away from your yard is Van's, about a mile?

A. A little farther than that, I would think. A mile and a half.

Q. How far from your yard is the Pine Tree Lumber Company?

A. One block.

A. One block.

Q. How far from your yard is the Escondido Lumber Company?

A. About five blocks.

Q. What was the other lumber company you mentioned?

A. Hayward.

Q. How far from your company is the Hayward Lumber Company?

A. Five or six blocks.

Q. You said that Mr. Swanson left that Marolite in the

[fol. 152] Escondido Lumber Company?

A. True.

Q. In the statement of Mr. Swanson, which is attached to the affidavit you filed—withdraw that. In this affidavit you say something about the truck from the John Goodman Construction Company being stopped from entering your yard?

Mr. Archer: May he be shown the original of that affidavit if you are going to cross-examine him about it?

Mr. Whelan: I don't think I have to show it to him, but it is in the file, I suppose.

Mr. Archer: What page and line are you referring to, Counsel? (Handing document to the witness.)

Mr. Whelan: Last paragraph on page 2 of the affidavit.

A. Yes, that is true. He was stopped by our west gate.

By Mr. Whelan:

Q. And who stopped him?

A. I do not know. One of the union representatives was talking to him.

Q. Do you know the name of the driver of the John Goodman Construction Company?

A. No, I do not. He never did come in.

Q. Did you see any of the union representatives talking to this driver?

A. Yes, I did.

[fol. 153] Q. Did you talk to that driver to ascertain whether or not he intended to come in?

A. At that moment I was very busy. I was having to run down Arnold Swanson and having to pick up my load. This fighting pickets was not our major job. We had to carry on our lumber business and these are just things we see out of the window while waiting on customers. We can't follow every one up. There just aren't enough of us.

Mr. Whelan: I move to strike that as not responsive.

The Court: May be stricken.

By Mr. Whelan:

Q. Either at that time or at any time subsequent to that time did you contact the driver of the truck of the John Goodman Construction Company to ascertain whether or not he intended to come into your yard?

A. No, sir, I did not. He was headed east——

Q. You have answered the question. You didn't contact him.

A. No.

Mr. Whelan: That is all.

Redirect examination.

By Mr. Archer:

Q. Were you expecting a delivery from this John Goodwin Construction Company, or a pick-up?

A. Not necessarily although we had bid a job just [fol. 154] prior to the picket coming on.

Q. A job of his?

A. A job of the John Goodwin Construction Company. The picket came on, I believe, a day or two after and we never were able to find out how we came out on that job after that. That was a few days later. I don't remember the date exactly.

Q. You had some anticipated business coming from the John Goodwin——

Mr. Whelan: That is objected to as leading and suggestive, if the Court please.

Mr. Archer: I will withdraw it.

Q. As I understand, then, you had bid a job of the John Goodwin Construction Company a few days previously?

A. Yes, we had asked—we had bid the main job and had asked for the pick-up business if we did not get the main job.

Q. It was after that that their truck came to your yard and stopped at or near the picket and then left?

A. Yes.

Q. And you received no business from them since that date?

A. No, sir.

Mr. Archer: I have no further redirect examination. Oh, withdraw that.

[fol. 155] Q. Can you identify, for the record, some of the automobiles which were used by the representatives of the unions at or around your premises during this period of time?

A. Yes. I could identify them. I don't have the license numbers in mind, though.

Q. Could you tell us what make and model of cars were being driven?

A. There was a 1953 black DeSoto; there was a 1952, I believe, Pontiac; there was either a very light green or light cream green—there was a Chevrolet coupe, about a '51, light tan in color; and the picket's car, I believe, was about a '46 or '47 Chevrolet, medium green. That is all I can recall off hand. There were two or three others.

Q. Which car was it that you followed?

A. The black DeSoto, Mr. Taylor's.

Q. Do you recall the license number 1B76774?

A. Yes.

Mr. Whelan: Objected to on the grounds it is leading and suggestive.

The Court: Overruled.

A. Yes, I do.

By Mr. Archer:

Q. Which one of these cars was that?

A. That was the Pontiac that followed Mr. Arnold Swanson and asked him for his union card number.

Mr. Whelan: I move to strike that on the grounds that [fol. 156] it is hearsay that he followed this driver and asked him for his union card, if he didn't hear any such conversation.

The Court: Did you see him?

A. I saw the car. I did not hear any conversation.

The Court: As far as conversation is concerned, it may be stricken.

By Mr. Archer:

Q. Where did you see that car go in following Swanson?

A. I just saw him go down the road after him, as he passed.

Q. Then when Swanson came—He did come back, as I understand it?

A. Yes.

Q. What transpired then when he came back to the yard?

A. He was waved away or they talked to him. On our property they talked to him. He was parked partially on our property. They talked to him and he turned around and left.

Q. When you say "They talked to him", who talked to him?

A. The union representatives.

Q. Can you identify who that was?

A. No, I can't.

Q. Was it someone that had been out there around the premises with the union representatives during this trouble? [fol. 157] A. Yes. There had been quite a few. It is hard to keep them straight.

Q. Thereafter Swanson drove away?

A. Yes.

Q. Do you recall the license number 1B 38575?

Mr. Whelan: That is objected to as leading and suggestive.

The Court: Overruled.

A. No, I can't.

By Mr. Archer:

Q. Did you ever see the Pontiac sedan that you have identified, a 1952 Pontiac sedan, '52 or '53, follow any of your trucks to any other job?

A. I did not personally.

Q. Do you recall the Einer job?

A. Yes.

Q. Did you ever see one of the union's cars following a truck to that job?

Mr. Whelan: Object to that as leading and suggestive.

The Court: Overruled.

A. I did not personally.

By Mr. Archer:

Q. Did you ever see that same car follow your Borrego truck?

Mr. Whelan: Just a minute. That is indefinite, if the Court please, as to which car he is referring to.

[fol. 158] Mr. Archer: I thought I said the same. If I didn't I will clarify that.

Q. Did you ever see the 1952 Pontiac, license number 1 B 76774, follow your Borrego truck as it left your yard?

A. I don't recognize the license number. I did see them follow the truck.

Q. With the exception of the license you did see the Pontiac that had been out on the picket line follow your Borrego truck away from your plant?

A. Yes.

Mr. Whelan: That is objected to as leading and suggestive, if the Court please.

The Court: Overruled.

By Mr. Archer:

Q. Is there a person by the name of Henry Faucett—Is that the right name?

A. It doesn't——

Mr. Archer: I have no further questions.

Recross-examination.

Mr. Whelan: By the way, where is Exhibit A?

The Clerk: Here.

By Mr. Whelan:

Q. I show you Defendants' Exhibit A in this case and I will ask you if the person that was picketing out there carried a placard similar to this?

[fol. 159] A. Yes, they did.

Q. And do you know whether or not one of your employees, for the sake of charity, shall we say, borrowed a sign similar to this after the picket left it up against his car and went across the street?

A. No, sir, I do not.

Q. You didn't see any such sign brought into your place of business?

A. No, sir.

Q. When these cars were driving by your place did you see someone pelt a union representative with a bunch of marbles?

A. I never saw it. I did hear about it.

Q. Did you know that the people who threw oranges at the union representative have kept the Taylor family in orange juice since this situation has arisen?

A. No, sir, I did not.

Q. You heard about the oranges being thrown?

A. Yes, I heard about it.

Q. Did you see the oranges being thrown at the union representatives?

A. No, sir, I did not.

Q. Did you see this pick-up truck that just missed running a picket down in front of your establishment?

A. No, sir, I did not.

Q. You heard about it, though?

[fol. 160] A. Yes, in this courtroom.

Q. What was that?

A. In this courtroom is the only time I heard about it.

Q. When did you hear about it in the courtroom?

A. It seems to me it was mentioned by you or one of the other attorneys.

Q. You didn't hear about it out at your place of business?

A. Not that I remember, no.

Q. Well, do you know that a car came out of the lumber yard and, driving on the wrong side of the street, missed a picket by just a few inches?

A. No, I did not.

Q. Do you know who it was that threw the oranges and marbles at the union representative?

A. No, sir, I do not.

Mr. Whelan: I believe that is all.

Mr. Archer: I have no further questions. Mr. Wyland.

WILLIAM S. WYLAND, called as a witness for and in behalf of the plaintiffs, and being first duly sworn, testifies as follows:

Direct examination.

By Mr. Archer:

Q. Please state your full name.
[fol. 161] A. William S. Wyland.

Mr. Whelan: Is that Marrow?
Mr. Archer: W-y-l-a-n-d (spelling).

Q. Where do you reside, Mr. Wyland?
A. Escondido.
Q. What is your business?
A. Retail building materials and lumber.
Q. What is the name of your company?
A. Pine Tree Lumber Company.
Q. Are you a partner in the operation of the Pine Tree Lumber Company?
A. Yes.
Q. Since the picketing commenced at the Valley Lumber Company, will you tell the Court, please, what deliveries, if any, that have been made to your yard?
A. I have known personally of approximately 15 deliveries that have been made to our yard with materials consigned to the Valley Lumber Company.
Q. Why were they delivered to your yard?

Mr. Whelan: Objected to on the grounds it calls for a conclusion and opinion of the witness.
The Court: I will sustain the objection.

By Mr. Archer:

Q. Have you ever seen any of the Valley Lumber Company trucks followed by automobiles manned by the union representatives over to your yard and around your yard?
[fol. 162] A. No.
Q. Do you know a contractor by the name of Angold?
A. Yes.
Q. Is he now a customer of yours?
A. Yes.

Q. Had he been prior to the picketing of the Valley Lumber Company?

Mr. Whelan: That is objected to on the grounds it calls for hearsay.

The Court: No, he would know whether or not he was a customer before that.

A. Prior to approximately 60 days ago he wasn't a customer of ours.

By Mr. Archer:

Q. Are you supplying jobs of his?

A. Yes.

Q. What is the gross amount of building materials dollar volume of building materials you are supplying him?

A. We are supplying him on two jobs. The aggregate amount of building materials used on those two jobs, I should say, would run about $4,000.

Q. What is the approximate net profit on that amount of building material?

A. The average margin of profit is approximately 25%.

Q. What is the history of increase or decrease of [fol. 163] volume of business in the month of May over the month of April in your Escondido yard?

Mr. Whelan: Objected to on the grounds it is irrelevant and immaterial to any issues in this case.

The Court: Overruled.

Mr. Whelan: May I add further, your Honor, there is no similarity of conditions shown between the two yards as to the size of the operation, and so forth, and therefore it couldn't be used as a guide in this situation.

The Court: Very well.

A. 1953, or generally?

By Mr. Archer:

Q. Year in and year out how does the month of May normally compare with the month of April?

A. Normally it is higher.

Mr. Archer: You may cross-examine.

Cross-examination.

By Mr. Whelan:

Q. Do I have your name correct, William S. Wyland?
A. Right.
Q. W-y-l-a-n-d (spelling)?
A. Yes.
Q. How long have you been in the business of the Pine Tree Lumber Company?
A. Approximately seven year; since its origin.
[fol. 164] Q. Now with reference to the deliveries that have been made to your yard that were supposed to have gone to Valley Lumber Company's yard, do you know whether or not a Mr. Swanson, *or* or about May 19th, delivered some Marolite to your yard to be picked up by Valley Lumber Company?
A. Not that I know of personally. He was in the yard and delivered material but I don't know whether it was ours or someone else's.
Q. On May 19th, that would be a Tuesday?
A. I couldn't say for sure about the date.
Q. Say, by the way, have you had any conferences with the Garmon brothers about this particular litigation?
A. Yes.
Q. And, of course, you are friendly with the Garmon family in this litigation?
A. In a business way, yes.
Q. And you have had some difficulties with the union representatives yourself, have you?
A. Yes.
Q. And you have consulted with Mr. Archer for the purpose of filing some action against the union, have you?
A. Yes.
Q. And such an action is contemplated?
A. Yes.
Q. And naturally you would like to see the Garmon family, the Valley Lumber Company, prevail in this action, [fol. 165] wouldn't you?
A. This action here?
Q. Yes.
A. Yes.

Mr. Whelan: I believe that will be all.
Mr. Archer: I have a few questions.

Redirect examination.

By Mr. Archer:

Q. Tell us what your difficulties are with these same unions?

Mr. Whelan: Object to that on the grounds it is incompetent, irrelevant and immaterial.
Mr. Archer: Counsel opened it up.
The Court: Overruled.

A. We signed—We also are plumbing contractors and we signed a contract to do the plumbing work on a job in the City of Escondido and the second day we were on the job the union representatives came on to the job and told all the other workmen that they couldn't work on the job; and it was late in the day at that time so that everyone left and went home. We are now doing the work on the job but we were forced to do it at odd hours, other than regular working hours.

By Mr. Archer:

Q. What is the situation with respect to future [fol. 166] contracts?

Mr. Whelan: That is objected to on the grounds it is irrelevant and immaterial and speculative.
The Court: Overruled. If you hadn't asked the question, Mr. Whelan, this would have been all immaterial, but you opened the door, as far as I can see.
A. The contractor——

Mr. Whelan: If the Court please, I simply asked the question for the purpose of showing the interest and bias of this witness, not to try his separate litigation in this lawsuit.
The Court: We are not going to try it, but you opened the door.

A. The contractor signed an affidavit stating that——

Mr. Whelan: I move to strike that on the grounds it is hearsay and not the best evidence.

The Court: I will sustain the objection.

By Mr. Archer:

Q. When you say you are forced by this action to complete your plumbing contract at odd hours, what hours are your men working?

A. They are working after the regular working hours of week days and on Saturdays.

Q. That applies to your plumbing crews only, as I understand, on that motel job?

A. That is correct.

[fol. 167] Mr. Archer: No further redirect examination.

Recross-examination.

By Mr. Whelan:

Q. Now on this—Mr. Archer inferred this is a motel job. What is the name of the motel?

A. I don't recall the exact name of the motel.

Q. What is the name of the General Contractor on the job?

A. Earl and Schroder.

Q. You knew, didn't you, that Earl and Schroder had a contract with the Building Trades Council?

A. I had no definite knowledge of the fact.

Q. When you say you had no definite knowledge of the fact——

A. I didn't understand.

Q. You said you had no definite knowledge of the fact?

A. I do know that he has a contract with the Building Trades Council.

Q. How did you come into the business of finishing up the plumbing after hours on this particular job?

A. You mean why we are doing it after hours?

Q. Yes.

A. Because of an agreement that he signed with the union.

Q. You mean Mr. Schroder had an agreement with the [fol. 168] union that he would hire no one but union help, is that it?

A. No, I was referring to the affidavit that he filed with the union.

Q. Did you know Mr. Schroder had an existing contract with the union to hire only union help on his job?

A. No, I did not.

Mr. Whelan: Nothing further.

Further redirect examination.

By Mr. Archer:

Q. Did you bid on that motel job as plumbing contractor, sub-contractor?

Mr. Whelan: That is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Yes, we bid on the job and were low bidder.

By Mr. Archer:

Q. Had you commenced the work on that before this affidavit was taken that you referred to?

A. Yes, we worked approximately four days previous to that.

Q. During regular working hours?

A. Yes.

Q. Then some affidavit was executed by Mr. Schroder and since that date you have worked after working hours, or your crews have, and on Saturdays?

[fol. 169] A. Yes.

Mr. Archer: That is all.

Further recross-examination.

By Mr. Whelan:

Q. Now, Mr. Wyland, if I understand the situation, it is this: Mr. Schroder does have union help on his job, does he not?

A. I assume that he does.

Q. And the unions have not struck the job or walked off, they simply have completed their work during regular working hours and you, being non-union, do the plumbing after the union people have completed their work and leave the job?

A. We did the work for four days along with whatever help he had.

Q. But after his attention was called to the fact he had a union contract then he required you to do the plumbing work after the union employees had completed their regular work and left the job?

A. He requested it so he would not be in trouble.

Q. But the union employees did not strike the job, they continued to work?

A. They were pulled off the job only once that I know of.

Q. They went on and completed the job, didn't they?

A. His help?

[fol. 170] Q. Yes, Mr. Schroder's employees who belong to the union.

A. Yes.

Q. And the only hitch in the thing was that your employees, being non-union, didn't work while the union employees were working, is that it?

A. That was the final results, yes.

Q. That is the reason why your crew had to work after hours and on Saturdays, right?

A. Yes.

Mr. Whelan: Nothing further.

Further redirect examination.

By Mr. Archer:

Q. Did I understand from what you said that prior to this arrangement being made, Schroder's presumably union employees were pulled off the job? Is that what you said?

A. The second day we were on the job the union representatives came on the job and told all the workmen to stop their work.

Q. Then this arrangement was worked out whereby an

affidavit was taken from him and you were permitted to work nights and Saturdays?

A. Yes.

Mr. Whelan: Objected to on the grounds it is leading and suggestive and includes the contents of a so-called [fol. 171] affidavit.

The Court: Overruled.

Mr. Archer: I have no further questions.

Mr. Whelan: That is all. Thank you, Mr. Wyland.

Mr. Archer: Mr. Hughes.

Lawrence B. Hughes, called as a witness for and in behalf of the plaintiffs, and being first duly sworn, testifies as follows:

Direct examination.

By Mr. Archer:

Q. Will you please state your full name?

A. Lawrence B. Hughes.

Q. Where do you reside, Mr. Hughes?

A. Escondido.

Q. What is your business?

A. Manager of the Escondido Lumber Company.

Q. Prior to the commencement of the difficulties at Valley Lumber Company did you have a long-distance telephone call with C. O. "Spud" Taylor?

A. I didn't understand the question, please. I am a little deaf. Get up a little closer and then I can get you.

Q. Prior to the commencement of the difficulties at the Valley Lumber Company did you have a long-distance telephone call from Mr. C. O. Taylor of the Building Trades [fol. 172] Council?

A. No, Collins.

Q. Oh, Collins?

A. Yes, sir.

Q. What did Mr. Collins say in that conversation?

A. He told me, if I remember right, that they couldn't do anything and they guessed they would have to get tough with him now.

Q. Get tough with whom?

A. The Valley Lumber Company, the way I understood it.

Mr. Whelan: Move to strike on the grounds it is a conclusion and opinion of the witness.

The Court: I think in its present form it may be a conclusion, unless you pin it down.

By Mr. Archer:

Q. Try, to the best of your recollection, Mr. Hughes, and tell us what he said.

A. Well——

Q. How did the conversation start?

A. He called me long distance.

Q. Did he identify himself to you on the telephone?

A. Yes, sir, as Mr. Collins.

Q. Then what did he say?

A. He told me, if I remember right, that they couldn't do anything peacefully and they were going to get tough.

Q. Had he referred to someone they were going to get tough with?

[fol. 173] A. Yes, sir, Valley Lumber.

Q. Was that the sum and substance of that conversation?

A. Yes, sir, about all there was to it.

Q. Can you fix for us the approximate time of that conversation?

A. No, sir, I cannot. Honestly.

Q. Prior to the commencement of the picketing?

A. Yes, sir.

Q. Now after the picketing commenced did you have a subsequent conversation with Mr. Collins?

A. Yes, sir.

Q. When did you have the second conversation with Collins?

A. I can't say, Mister. He was in my office several times and I can't recall those dates.

Q. Was it after the picketing commenced?

A. He was in after the picketing commenced, yes, sir, once.

Q. Now on the occasion that he came in after the picketing commenced, can you fix the date of that one?

A. That was on May 4th.

Q. Of this year?

A. Yes, sir.

Q. What did he say to you in that conversation?

[fol. 174] A. He told me that if I didn't quit receiving merchandise for the Valley Lumber Company that they would have to picket me, or my company rather.

Mr. Archer: You may cross-examine.

Cross-examination.

By Mr. Whelan:

Q. How long have you been connected with the Escondido Lumber Company?

A. I didn't get the question.

Q. Pardon me, Mr. Hughes. I will move up. How long have you been connected with the Escondido Lumber Company?

A. About eleven or twelve years.

Q. Does the Escondido Lumber Company have any contracts with the labor unions?

A. Not to my knowledge.

Q. They don't want to have any contract with the labor unions, do they?

A. Not to my—I don't think they do.

Q. You say that Mr. Collins called you on the telephone?

A. He called me long distance first, on the telephone, before there was any picketing.

Q. Do you remember what date that was?

A. No, sir, I do not.

Q. And now are you sure that it was Mr. Collins that talked to you?

[fol. 175] A. Well, I am sure as a man can be that talks to another man over the telephone. If I remember right, he identified himself.

Q. This man that talked to you said "This is Mr. Collins"?

A. If I remember right, yes.

Q. What else did he say?

A. That is about all he told me.

Q. He didn't tell you what particular organization he represented, did he?

A. He did not.

Q. And what, again, did he say to you over the phone that you remember?

A. Well, he said they were going, if I remember the conversation, he said that they couldn't settle it peacefully, or something; that they were going to get tough. That is the substance of the conversation. I don't remember word for word.

Q. Didn't he say that the employees of the Valley Lumber Company had decided not to become members of the union so that they had decided to picket?

A. He did not say that.

Q. Did he tell you that they had decided to picket the Valley Lumber Company?

A. Just repeat that question, please?

Q. Did he tell you that they had decided to picket the [fol. 176] Valley Lumber Company, or its employees?

A. He did not.

Q. He did not say that?

A. No, sir.

Q. And as you recall it, he said that they hadn't been able to do anything with the Valley Lumber Company so they were going to have to get tough?

A. That is the way I remember it.

Q. What did you say to him?

A. I don't think I even answered him.

Q. Then the phone was hung up on both ends?

A. Yes, sir.

Q. Had you had any previous conversations with Mr. Collins about the Valley Lumber Company?

A. Why, he had been in my office quite a few times and talked to me, talked to me about it, about the union, and so forth, but I don't remember whether he ever specifically mentioned the Valley Lumber Company.

Q. He was talking to you about your organization when he was in your office, wasn't he?

A. Yes, sir.

Q. As you say, you don't remember whether he ever specifically mentioned Valley Lumber Company to you?

A. Why, I don't remember any specific conversations. No, I do not.

Q. Then out of a clear sky one day Mr. Collins phoned [fol. 177] you up and said, "We can't do anything with the Valley Lumber Company so we are going to have to get tough?"

A. That is my remembrance of the conversation.

Q. Then you didn't say anything to him and both of you hung up?

A. If I remember right, that is correct.

Q. Now you say that he was in your establishment once after the picketing had started and you fix the date as May 4th?

A. Yes, sir.

Q. How do you fix that date?

A. I made a note of it at the time.

Q. And what did he say to you on that occasion?

A. He told me that if I didn't quit receiving stuff for the Valley Lumber Company that they would have to picket me.

Q. Now they haven't picketed you, have they?

A. No, sir, they have not.

Mr. Whelan: I believe that is all.

Mr. Archer: Your Honor, may I have permission to reopen his direct on one subject only?

The Court: You may.

Further direct examination.

By Mr. Archer:

Q. Mr. Hughes, does your—or the Escondido Lumber Company's business follow some pattern of increase or [fol. 178] decrease of business during the spring months?

A. Why, I don't know. My business runs pretty even as a rule, month in and month out.

Q. Did you have an increase of business in May over April?

A. Yes, sir.

Q. What was the increase?

A. It was between twenty and twenty-five per cent.

Q. That is this year?

A. Yes, sir.

Mr. Archer: That is all.

Further cross-examination.

By Mr. Whelan:

Q. Mr. Hughes, as a general proposition you believe that your business runs pretty much the same, month in and month out, year after year?

A. Yes, sir.

Mr. Whelan: That is all.

Mr. Archer: That is all.

The Court: You may step down.

Mr. Archer: We will call Mr. C. O. Taylor under Section 2055 of the Code of Civil Procedure.

The Court: Let's take our morning recess at this time.

Mr. Archer: I would like to just ask about two questions [fol. 179] before the recess.

Mr. Whelan: We won't coach him, Mr. Archer.

C. O. Taylor, called as a witness for and in behalf of the plaintiffs under the provisions of Section 2055 of the Code of Civil Procedure, and having been first duly sworn, testifies as follows:

Examination by Mr. Archer:

Q. Please state your full name.

A. Charles O'Brien Taylor.

Q. What is your official capacity with the San Diego Building Trades Council, Mr. Taylor?

A. I am not affiliated with the Building Trades Council.

Q. What are you affiliated with?

A. I am the representative of the Millmen's Union, Number 2020, San Diego Affiliated District Council of Carpenters, San Diego Federated Trades and San Diego Council of Millmen.

Q. Who is the Secretary of the Building Trades Council?

A. Mr. Morris Collins.

Q. The Mr. Collins here in Court?
A. Yes, sir.

Mr. Archer: I have no further questions. Mr. Collins, [fol. 180] will you take the stand pursuant to Section 2055 of the Code of Civil Procedure?

Mr. Holt: I thought he wanted to ask two questions of Mr. Taylor.

Mr. Archer: I did.

Mr. Whelan: And he is not going to cross-examine him.

The Court: Do you want to cross-examine him?

Mr. Holt: I might. He doesn't belong to our organization. I might want to cross-examine him for two or three days.

Mr. Archer: Good. That would be interesting. Will you step up and be sworn, Mr. Collins?

Morris Collins, called as a witness for and in behalf of the plaintiffs under the provisions of Section 2055 of the Code of Civil Procedure, and having been first duly sworn, testifies as follows:

Examination by Mr. Archer:

Q. Will you please state your full name?
A. Morris John Collins.
The Court: Are you calling him as your own witness?

Mr. Archer: I thought I announced when I called him, I was calling him pursuant to Section 2055 of the Code of Civil Procedure.

The Court: O. K. O. K.

[fol. 181] Mr. Archer: Thank you, your Honor.

Q. Mr. Collins, are you Secretary of the San Diego Building Trades Council?
A. I am.
Q. During the morning recess now will you call your office and ask someone there to bring to court the minutes, the Minute Book of the San Diego Building Trades Council, please?
A. We have—the Council has been formed for a long

number of years and those books run from one to the other. I would have to know what date, or what time you were interested in.

Q. I want the Minute Book for 1952, 1953—1951, 1952, 1953, the same one we had in Court in the Benton case, if that will help you identify it.

Mr: Whelan: There have been some additions since then.

Mr. Archer: I assume they have added some things in respect to this controversy but I would like to see what they had in it at the same time I saw it in the Benton case. Will you call your office and ask them to bring it over, and if there is anything spent in connection with cab fare to have it here this morning, I will defray that expense.

A. I will see that it is here.

The Court: We will take our morning recess at this time.

(Recess.)

[fol. 182] The Court: Court is in session. You may proceed.

Mr. Archer: Mr. Bailey.

GLENN EARL BAILEY, called as a witness for and in behalf of the plaintiffs, and being first duly sworn, testifies as follows:

Direct examination.

By Mr. Archer:

Q. Please state your full name.
A. Glenn Earl Bailey.
Q. Where do you reside?
A. Escondido.
Q. What is your business?
A. Clothing.
Q. Have you recently done some construction work?
A. I have.
Q. And have you used a contractor by the name of Paulson?
A. Yes, sir, I have.

Mr. Whelan: What is that?
Mr. Archer: Paulson.

Q. Were you on occasion on a job of his at 11th and Upas Streets?
A. I was.
Q. Was that one of your construction——
A. No.
[fol. 183] Q. Why were you there?
A. Just to converse with Mr. Paulson.
Q. Approximately when was that, sir?
A. Oh, it was April or May, or March, rather. March or April.
Q. March or April. At that time while you were there conversing with Mr. Paulson did you see a representative of one of the unions involved in this case?

Mr. Whelan: I object to that on the grounds no foundation and calls for a conclusion and opinion.
The Court: Overruled.

By Mr. Archer:

Q. Did you see a man come on that job and talk to Mr. Paulson's workers?
A. I did.
Q. Is that man in the courtroom?
A. Yes, he is.
Q. Can you point him out to us?
A. It is the—second from the righthand side, third seat back. That is the gentleman there with the glasses.

Mr. Whelan: John Carlin.
The Court: Who is he?
Mr. Whelan: John Carlin.

By Mr. Archer:

Q. Did you overhear a conversation between Mr. Carlin and one of Paulson's workers?
[fol. 184] A. Yes, I did.
Q. What was said by Mr. Carlin?

Mr. Whelan: That is objected to on the grounds that as to the defendants in this case it is hearsay, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Whelan: I might add, your Honor, that Mr. Carlin is a member of the Carpenters' Union and no Carpenters' Union is a party defendant in this action. The only union that would touch upon the work of the carpenters is the Millmen's Union, of which Mr. Taylor is the business representative, but Mr. Carlin, being a Carpenter and not a Millman, it would be hearsay.

Mr. Holt: I have to object on behalf of my client on the grounds it would be hearsay.

The Court: Very well. Overruled.

By Mr. Archer:

Q. What did Mr. Carlin say to Mr. Paulson's workman?

A. Well, they were discussing the time they were trying to unionize the Valley Lumber Yard.

Mr. Whelan: Move to strike that on the grounds it is a conclusion and opinion, and not a statement of what was said.

The Court: Will you give me the question and the answer.

(The record read by the reporter.)

[fol. 185] The Court: Overruled.

By Mr. Archer:

Q. You may continue.

A. So, it come down—they said wasn't there a picket, and this gentleman said he didn't know legally whether they could picket or not.

Q. Was there any other conversation that you heard?

A. Oh, they were talking; I wasn't paying too much attention to it. They were talking probably for thirty minutes.

Q. Is that all you recall having heard at that time?

A. That is right.

Q. Now you constructed an apartment house?

A. Triplex.

Q. You call it a triplex?

A. Yes.

Q. When was that job under way?

A. It was completed in February.

Q. From whom did you buy your building materials at that time?

Mr. Whelan: Objected to on the grounds it is incompetent, irrelevant and immaterial.

The Court: Is this just preliminary?

Mr. Archer: Yes, sir.

The Court: O.K. Overruled.

A. Valley Lumber Yard.

[fol. 186] By Mr. Archer:

Q. Now you have a new job underway, or getting under way?

A. That is right.

Q. Are you buying your materials from the Valley Lumber Company?

A. No, I am not.

Q. Had you intended to buy them there prior to the picketing?

A. I did.

Q. Can you estimate for me the approximate cost of materials on that job?

Mr. Whelan: Objected to on the grounds no foundation laid.

The Court: Overruled.

A. Probably around $4,000.

Mr. Archer: You may cross-examine.

Mr. Whelan: I move to strike the evidence given as to a purported conversation between John Carlin and other individuals taking place sometime during the month of March, or April, on the job of Mr. Paulson.

The Court: Overruled. Motion denied.

Mr. Whelan: No questions.

Mr. Archer: You may step down. Your Honor, Mr. William Garmon has produced the records as requested, both as to the sales records and payroll records. I have one other [fol. 187] witness to call who is not here yet and if they want to continue their cross-examination on these records, I suggest it be done now.

Mr. Whelan: May we see the records?

Mr. Archer: Yes.

Mr. Whelan: May we just have a few moments to talk to Mr. Garmon?

The Court: Go ahead. I tell you what we will do. We will take a recess and you call me when you are ready.

Mr. Whelan: Thank you, your Honor.

(Recess.)

Mr. Archer: Mr. Collins, will you resume the stand, please?

Mr. Holt: Take these books with you, Mr. Collins.

MORRIS COLLINS, recalled as a witness for and in behalf of the plaintiffs under the provisions of Section 2055 of the Code of Civil Procedure, and having been previously duly sworn, resumes the stand and testifies further as follows:

Examination by Mr. Archer:

Q. Pursuant to my request have you brought to court the Minute Books of the San Diego Building Trades Council for—apparently it commences November 20, 1951?

A. 2 and 3.

Q. 2 and 3?

[fol. 188] Mr. Archer: We will ask that be marked for identification, the first volume commencing in 1951, as Plaintiffs' 2, I believe.

The Court: 3.

Mr. Holt: Before they are marked, I wish to object to that unless they can show relevancy. It would be highly improper to have them marked so Counsel and his clients can peruse the books of our account to educate themselves about our business, which is not their business. I think, therefore, they should not be made a public record, which they are. When they are not in session they can go see the books. They are required first to lay a foundation to show these have some bearing on the case. Those particular parts should be deleted and introduced in evidence.

The Court: I think there is something to his objection.

Mr. Archer: I am only interested in the entries in the

books with respect to the commencement of the picketing of the lumber company. When I was looking through this same book which they produced at the Benton case, on their own volition without our request, they brought it in for some purpose and had it in court. They didn't have any objection to it at that time.

Mr. Holt: I was not here.

Mr. Archer: No, I recall you were not present. I observed entries dating way back beyond the time that they now claim that they planned an invitational program in this [fol. 189] matter, in which it was certainly not referred to as such, and I want to relocate and ask Mr. Collins with respect to those entries, and those only.

The Court: I tell you what I will do, Mr. Archer. I will permit—We are going to take a long recess this noon, until two o'clock. If you want to come down with Counsel at 1:15 and look them over and find what you want out of them, I will let you do that.

Mr. Archer: I don't want to search around and I am not concerned about how they operate except in this specific case.

The Court: Do you want to come down at 1:15?

Mr. Archer: Will the Court be open at 1:00?

The Court: Well, the Bailiff——

Mr. Archer: They are quite voluminous.

The Court: The Bailiff will be here and will let you in.

Mr. Archer: Very well. I made an error, your Honor. I thought that the red backed book was the first volume in order. The black, larger book is the first one and I will substitute it as Plaintiff's Exhibit 3 for identification, and the red one as Plaintiffs' Exhibit 4 for identification.

Mr. Holt: I now object to having this done at all until some foundation is laid. I think he is not going to find out what he wants in there.

Mr. Archer: Maybe not.

[fol. 190] The Court: We will have the books left there. I don't think Mr. Holt has any objection to that, and as soon as the Bailiff shows up I will instruct him to let you in with Mr. Holt at one o'clock.

Mr. Holt: Can I have an arrangement with Counsel to make it about 1:15. I have been out of the office for some considerable time and——

Mr. Archer: That is O. K.

The Court: When will you be back, John?

The Clerk: About 1:15.

The Court: You let them in.

Mr. Holt: Is it understood neither counsel will open the books until both are here?

The Court: Yes, that is right.

Mr. Archer: If we cannot conclude until later——

The Court: I will give you additional time.

Mr. Archer: Thank you, Mr. Collins. Mr. Waddell, will you take the stand, please?

WARD W. WADDELL, JR., called as a witness for and in behalf of the plaintiffs, and being first duly sworn, testifies as follows:

Direct examination.

By Mr. Archer:

Q. Please state your full name.

A. Ward W. Waddell, Jr.

[fol. 191] Q. What is your profession?

A. I am a lawyer.

Q. With whom are you associated?

A. With the law firm of Gray, Cary, Ames & Frye.

Q. As such and at my request did you carry on a series of correspondence with the National Labor Relations Board, to wit, the Regional Director of such Board in Los Angeles?

A. Yes, the Regional Office in Los Angeles.

Q. I show you a file of correspondence and, directing your attention particularly to a carbon copy of a petition for a determination of representation of the employees of the Valley Lumber Company, and a letter accompanying that, I will ask you if, on or about May 7, 1953, you addressed that letter and the original and copy of that petition to the National Labor Relations Board in Los Angeles?

A. Yes.

Q. Did the correspondence which is now attached to that ensue as a result of that petition?

A. Yes.

Mr. Archer: We will offer it in evidence as Plaintiffs' Exhibit 5.

Mr. Whelan: To which we will object on the ground it is incompetent, irrelevant and immaterial and not within the issues of this case and not tending to prove or disprove any [fol. 192] of the issues in the case and my particular objection is to the exhibit in this, that a petition for an election to have a bargaining agent determined is not comparable to a complaint filed with the National Labor Relations Board complaining of an unfair labor practice and that a petition filed with the National Labor Relations Board for an election is entirely irrelevant and immaterial to the issues in this case.

I make the further objection that it is incompetent. Now the manner of dealing with a petition for an election to determine a bargaining agent, I think, doesn't settle anything at all and it certainly wouldn't have the force or effect of an order of the National Labor Relations Board refusing to take jurisdiction after a complaint had been filed, or a request for a complaint, filed, complaining an unfair labor practice and, as a matter of discussion, your Honor will remember in the Benton case, which Counsel is so happy to refer to, there was a petition on the part of the employer requesting an election and there was introduced in evidence a letter which was sent by me, at the time representing the Teamsters' Local Union, No. 36, in effect stating that no members of the—or no employee of the Benton Company was a member of Local No. 36 and we did not claim that any employees were members of Local No. 36 and therefore we saw no necessity for holding the election, and after receipt of that letter the National Labor Relations Board dismissed the petition for an election.

[fol. 193] Now in this particular case on May 7th, which was the date that this action was filed, and the date that the temporary restraining order was issued, and presumably the complaint was filed and the temporary restraining order issued before this petition for election ever got into the hands of the National Labor Relations Board, and therefore any act on the part of the National Labor Relations Board, even in refusing to hold an election for the purpose of determing a bargaining agent, was something that occurred after the filing of the complaint and therefore not within

the issues of the case, but moreover it is an easy thing to file a petition for election and then to have the National Labor Relations Board dismiss the petition for election.

I say that that has no force or effect and is not comparable at all to an order of the National Labor Relations Board refusing to take jurisdiction after a complaint charging an unfair labor practice has been filed. For that reason I believe that the exhibit is irrelevant and immaterial, and, of course, as Counsel has just pointed out to me, it doesn't show, nor does it tend to show an exhaustion of the remedies on the part of the plaintiff here before the tribunal that has been selected by the Congress as a tribunal before whom complaints for unfair labor practices should be filed.

The Court: Mr. Whelan, in view of your preliminary objection here to the jurisdiction of the court, I would [fol. 194] certainly be interested to know what the Labor Relations Board has done. I think your present statement on this thing is inconsistent with your original objection to the jurisdiction of this court. It seems to me if you contend the National Labor Relations Board should take the case over and they have refused to act in it, that it is material.

Mr. Archer: May I cite one authority, your Honor?

The Court: Wait a minute.

Mr. Archer: I am sorry. Go ahead.

Mr. Whelan: I think your Honor's position would be, or the question you have asked me would be answered in this way: If they filed a petition with the Board asking the Board to take action because of an unfair labor practice and then the Board turned them down, then they would have, at least, attempted to pursue the remedy which the Congress has set up for complaints of unfair labor practices where the business is engaged in interstate commerce, but I can't think of, in my mind, any analogous situation to the filing of a petition for a bargaining agent other than to say, perhaps, if someone filed a petition to have a guardian ad litem appointed for the purpose of conducting a suit, and that petition was denied and then later on someone might come in and file a similar petition and have it granted and then file the action, the fact that the first petition for the appointment of the guardian ad litem was denied wouldn't be a bar in any sense to the subsequent petition or the

[fol. 195] action. If they had filed a complaint with the National Labor Relations Board complaining of unfair labor practices and then been turned down, that would have been something.

The Court: If they had filed that kind of a petition when would they have heard from them?

Mr. Whelan: Right away. I just finished a proceeding before the Trial Examiner of the National Labor Relations Board and a complaint was filed with the National Labor Relations Board against an employer and against a labor union, or two unions, complaining of unfair labor practices, filed on one afternoon and the complaint was issued and served by mail, as provided in the statute, on the parties next day.

The Court: Who filed the application?

Mr. Whelan: That application was filed by a man by the name of Peters, and was filed against the Clairemont Development Company and James A. Wilson and others as the contractors engaged in the portion of the construction of this tract north and west of the city, and the complaint was filed against the International Union of Operating Engineers, Local Union No. 12, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 36, and we had a hearing which they held in the Land Title Building a few months ago and now they have handed down a decision holding there was no unfair labor practice on the part of either the employer or [fol. 196] unions against this particular individual. They got their proceedings out right away and the hearings are conducted as expeditiously as possible and then if the parties don't abide by the ruling of the Board, they go into Federal Court and get restraining orders and the National Labor Relations Board are authorized, upon the filing of a petition charging an unfair labor practice, to go into the Federal Court immediately and ask for a restraining order, if it appears that such a restraining order is necessary.

The Court: What have you to say?

Mr. Whelan: I see Mr. Waddell nodding his head "no", but that is the way I interpret the law.

Mr. Archer: In Volume I, Labor Law Reports, your Honor, there is an article which I will leave with you and I'm sure it will interest you. It is entitled "N.L.R.B. Tests for Taking

Jurisdiction". I will read three sentences that sum up at the end of the preliminary discussion their discretionary right to act or not to act whenever they have a mind to do one or the other. With respect to the jurisdictional question Mr. Whelan pointed out trying to distinguish between the representation hearing and an unfair labor practice charge, this is what this says:

"The jurisdictional standards are applicable in most representation and unfair labor practice cases and they apply when charges are filed against a union, as well as when they [fol. 197] are filed against an employer. Of course, the Board is not bound to follow these standards; it may change them at any time, or it may ignore them in particular cases, as it has in the case of the hotel industry (84 note below). For this reason, any employer actually covered by the Act cannot be absolutely certain that the Board will refuse to act on a labor dispute in his business, even if his interstate sales and purchases are below the present jurisdictional standard; he can only assume that the Board probably will not act in the case. Under the established criteria, the Board will take jurisdiction of cases involving any of the following:" Then they cite them and it is covered in the correspondence and he says the same thing in there, that although the Labor Management Relations Act covers the situation, the Board, within its discretion, just will not act, and it makes no difference whether it is a representation matter or an unfair labor practice. This note fully covers——

Mr. Whelan: What are you reading from?

Mr. Archer: Commerce Clearing House, Inc., Labor Law Reporter, Volume I, Paragraph 1615, commencing at page 1651.

Mr. Todd: What is that page?

Mr. Archer: 1651. Entitled "N.L.R.B. Tests for Taking Jurisdiction". It is the very point which Judge Pope pointed out in that very brief concurring opinion in the Capitol Service case in which he said this:

[fol. 198] "In adding this special concurrence I want to state that I think there is a most difficult question lurking in the background of this case and which it should be understood I, for one, do not now decide. Suppose that hereafter

the Board should decide, as we have held it has a right to do, Haleston Drug Stores versus National Labor Relations Board, that Capitol Services' operations were so essentially local that their interruption would not have the requisite effect on commerce. If that time came it is possible that we might find difficulty in discovering any intention of Congress to the effect that where the Board thus exercises its uncontrolled discretion to leave a controversy and a business alone, state action is prohibited." Then he cites Missouri Pacific Railway versus Larabee Mills, 211 U. S. 612, 623; Kelly versus Washington, 302 U. S. 1, 12.

The Court: In view of the objection made at the beginning of this trial as to the jurisdiction of the Court, I will let in the correspondence and petition, and so forth. I want to find out what happened. I want to see what effort has been made to handle this matter through the National Labor Relations Board.

Mr. Archer: Incidentally Mr. Whelan was in error, your Honor. We made the request of the National Labor Relations Board prior to coming to Court here.

Mr. Whelan: Your letter is dated May 7 and their answering letter May 8th, and the complaint was filed May [fol. 199] 7th and the order was issued May 7th.

The Court: I think I should have all the information I can possibly get, so I will admit the correspondence.

Mr. Archer: I have no further questions.

The Court: It is twelve o'clock now.

Mr. Whelan: I have a few I would like to ask him at two o'clock.

The Court: You can ask him now if you wish.

Mr. Whelan: It might take quite a little while.

The Court: Well, we will recess then until two o'clock.

(Noon recess.)

Mr. Archer: I have just a small portion of the record I haven't checked, your Honor, and with your permission and that of Counsel, Mr. Waddell will finish that while we go ahead, and after he is through testifying.

The Court: O. K.

WARD W. WADDELL, JR., called as a witness for and in behalf of the plaintiffs, and having been previously duly sworn, resumes the stand and testifies further as follows:

Cross-examination.

By Mr. Whelan:

Q. Mr. Waddell, did you prepare and file on behalf of the Valley Lumber Company with the National Labor Relations Board a complaint of unfair labor practices on the [fol. 200] part of the unions involved in this lawsuit?

A. On the part of the unions?

Q. On the part of the company against the unions involved here?

A. No.

Q. Did you, sometime prior to August 15, 1952, on behalf of the Northern San Diego County Lumber Association prepare and file with the National Labor Relations Board a complaint charging unfair labor practices on the part of the Teamsters, Local No. 36, and the Millmen, Local No. 2020, charging unfair labor practices against those unions in their dealings with the St. Malo Lumber Company?

A. No.

Q. Was any such complaint prepared and filed in your office?

A. I don't think so.

Q. Are you aware of the fact that a complaint had been filed by the Northern San Diego Lumbermen's Association against the Teamsters, Local No. 36, and Millmen, Local No. 2020?

A. I wasn't conscious. If I was ever informed of it I had forgotten it.

Q. You are familiar with the provisions of Section 160, of Title 29 of the United States Codes, Annotated, are you not?

A. It is a part of the National Labor Relations Act. [fol. 201] Is that Section 10 of the Act?

Mr. Archer: May I show him my volume?

Mr. Whelan: Yes, surely.

Mr. Archer: So he can identify it.

Mr. Whelan: It would be in the amendment.

A. I am aware of some parts of that section.

By Mr. Whelan:

Q. You are aware of the part of the section that provides that the National Labor Relations Board is empowered to prevent anyone from engaging in an unfair labor practice as defined by the Labor Management Relations Act of 1947, are you not?

A. Yes, sir. I see that in Paragraph A.

Q. Of Section 160?

A. Yes.

Q. Then looking over to the paragraph lettered J, I will ask you if you are aware that the Board shall have power, but issuance of a complaint, as provided in Sub-Section B of Section 160, charging any person with engaging in an unfair labor practice to petition any District Court of the United States within any District where the unfair labor practice in question is alleged to have occurred for a temporary restraining order.

A. I see the Section.

Q. You see the section. Well, you mean you weren't familiar with the provision of the section before?

[fol. 202] A. I may have read it in the past.

Mr. Whelan: What is the answer, please?

(The record read by the reporter.)

By Mr. Whelan:

Q. I take it that you assisted in the preparation of the complaint that was filed in Superior Court in this pending action?

A. Yes, sir.

Q. And in preparing this complaint, Mr. Waddell, will you look at Section 158 of Title 29 there?

A. All right.

Q. Is it your understanding that this complaint is prepared and charges a violation of Sub-Section 2 of Section B of Section 158?

A. No, sir.

Q. What do you contend that the complaint does charge?

Mr. Archer: To which I object on the ground the complaint is the best evidence of what allegations it contains.

The Court: Overruled. He may answer.

A. Our theory was that it charges the violation of the law of the State of California in that—the ultimate object was to compel the plaintiffs to sign a contract which would, if enforced, result in a violation of Paragraph A of Section 158.

[fol. 203] By Mr. Whelan:

Q. Paragraph A of 158?

A. Yes, sir.

Q. And which Sub-Section of Paragraph A of Section 158?

A. Sub-paragraph 1 and 3.

Q. Sub-paragraph 1 and 3. That is the unlawful objective as complained of, is that right?

A. The ultimate unlawful objective.

Q. Now with reference to Sub-section 1 of Paragraph A, it provides that it is an unlawful labor practice for an employer to interfere with or restrain or coerce employees in the exercise of rights guaranteed in Section 157 of the title, is that right?

A. Yes, sir.

Q. And also you claim that a violation or attempting to violate Sub-section 3 of Paragraph A which says it is an unfair labor practice by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, is that right?

A. Yes, sir.

Q. Provided that nothing in this sub-chapter or in any other statute of the United Ststes shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership therein [fol. 204] on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, and then some provisions with reference to the selection of a bargaining agent, and so on, is that right?

A. Yes, sir.

Q. Now you think it would be an unfair labor practice for an employer to discourage membership in a labor organization?

A. Yes, sir.

Q. And it would be an unfair labor practice for an employer——

A. Let me say to do that by discrimination in regard to hiring or tenure of employment or any term or condition of employment.

Q. And it would be an unfair labor practice for an employer to interfere with or restrain or coerce the employees in the exercise of rights guaranteed in Section 157 of the title, which Section 157 gives them the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection?

A. Yes, sir.

Q. Now you say you did not make any complaint as provided in Section 160 of Title 129 of the U. S. Codes, [fol. 205] Annotated, to the National Labor Relations Board against the unions involved here for unfair labor practices such as picketing or boycotting or the like, right?

A. No, sir. That is correct.

Q. Now you don't complain in the complaint that it is an unfair labor practice for the union to picket the employees, do you, Mr. Waddell?

A. We don't claim that in the complaint, no, sir.

Mr. Whelan: I believe that is all.

Redirect examination.

By Mr. Archer:

Q. Mr. Whelan has asked you twice if you filed any complaint or charge of unfair labor practices in this case to which you have said no. Why did you not file such a complaint or charge?

Mr. Whelan: That is objected to on the ground it calls for a conclusion and opinion and self-serving declaration.

The Court: Overruled.

A. We were doubtful that any unfair labor practice by the unions was being committed insofar as the picketing of

the plant of the plaintiff in this case was concerned. We did not consider whether that might be violating the rights of the employees and, perhaps, the employees would be entitled to file a charge of unfair labor practices under 158 B, 1. But we also had in mind that the practice before [fol. 206] the Labor Relations Board involved a considerable delay. Section J, Paragraph J, Section 160, which you have read to me, gives the Board power to apply for an injunction. That does not give the general counsel or his employees power, at least in its general terms, and this is in that respect from Paragraph L which relates to violation of Section 8.B, 4 of the Act. Section 8 B, 4, relating to secondary boycott and certain types of jurisdictional strikes in which the procedure is quite rapid. We did not anticipate that the procedure, in passing upon any complaint we would file on the merits, would be rapid, and it was our belief that the union had not yet committed an unfair labor practice, at least, against the employer.

Q. Did you have any conversation with a representative of the Regional Director with respect to their jurisdiction in this as to whether or not they would take jurisdiction of an unfair labor practice?

Mr. Whelan: That is objected to on the grounds it calls for hearsay and foundation laid.

The Court: You may say whether you had a conference and thereafter I think it is hearsay.

Mr. Archer: It goes to his intention, your Honor. I think it is an exception to the hearsay rule. They have inquired as to the filing of these charges and I would like to show that the matter was considered and what transpired.

Q. First, did you have a conversation with Mr. Davis, [fol. 207] a representative of the National Labor Relations Board in Los Angeles in respect to their taking jurisdiction of an unfair labor practice charge in this matter?

Mr. Whelan: That is objected to on the grounds it is incompetent, irrelevant and immaterial, and calls for hearsay.

The Court: Overruled.

A. Yes, I had such a conversation by long-distance telephone. I would say——

Mr. Whelan: Just a minute. From now on out——

A. I would say two or three days after our petition was filed.

The Court: After your petition was filed?

A. Yes, he called me.

By Mr. Archer:

Q. Please state whether or not Mr. Davis informed you that they applied the same tests for taking jurisdiction in a representation matter as they did in an unfair labor practice matter.

Mr. Whelan: That is objected to on the ground it is leading and suggestive and calls for hearsay and — incompetent, besides the ground it is not an official pronouncement of any of the Board or its duly constituted agents.

The Court: We are entitled to know the attitude of the Board, I think.

Mr. Whelan: If your Honor please, how many times have you read the decisions of the Supreme Court where it says, [fol. 208] "This question is raised in the proof but because it is not necessary to pass upon this question we make no pronouncement with respect to the contention"? Until they file a complaint with the National Labor Relations Board there can't be any official action and we can't determine their attitude and the hearsay statement of some employee, off the record and not based upon a petition addressed to the Board is, in my opinion, the rankest kind of hearsay, and, of course, couldn't disclose the attitude of the Board, itself.

The Court: Well, I will sustain the objection.

Mr. Archer: I have no further questions.

Mr. Whelan: Thank you, sir.

The Court: Mr. Waddell, after talking to Mr. Davis you didn't file an unfair labor practice complaint?

A. No, sir.

The Court: O. K.

Mr. Whelan: They already had a restraining order in this court at that time, your Honor.

Mr. Archer: Mr. Welch, will you take the stand, please?

CECIL E. WELCH, called as a witness for and in behalf of the plaintiffs, and being first duly sworn, testifies as follows:

Direct examination.

By Mr. Archer:

Q. Will you please state your full name?

[fol. 209] A. Cecil E. Welch.

Q. Where do you reside, Mr. Welch?

A. 542 West 11th, Escondido, California.

Q. By whom are you employed?

A. By the Valley Lumber Company.

Q. In what capacity?

A. As a sales clerk.

Q. Since the picketing of the Valley Lumber Company commenced on April 28th have you had occasion to observe the automobiles of the union representatives that have assembled at and about the Valley Lumber Company yard?

A. Yes, sir.

Q. Have you observed them following your company's trucks?

A. Yes, sir.

Q. Have you, in turn, followed the cars containing the union representatives on occasion?

A. Yes, sir.

Q. Will you tell us in your own words the details of each of those incidents, please?

A. Well, the first time—there had been several cars, you know. They would pull in and wait until we had a truck going out.

Q. When you say the cars pulled in, whose cars were those?

A. Union officials.

[fol. 210] Q. Do you identify any of them sitting in the courtroom now?

A. Yes, sir.

Q. Which ones?

A. There is a gentleman sitting right over yonder in that corner.

Q. In the second row of the spectators there?

A. Yes, sir.

Q. The fartherest man on the right?

A. No.

Q. The second man?

The Court: In the brown suit?

A. No, the light gray suit with the glasses on.

Mr. Archer: That is Mr. C. O. Taylor, may it be stipulated?

Mr. Whelan: Charles O'Brien Taylor.

Mr. Archer: Also known as "Spud"?

Mr. Whelan: Yes, sir.

By Mr. Archer:

Q. Any other of the men you see in the courtroom?

A. Yes, sir, the dark headed gentleman sitting in the center of the second aisle.

Q. In the brown suit?

A. Yes, sir.

Q. Plain brown or solid colored brown tie?

A. It is a medium brown.

[fol. 211] Mr. Archer: May it be stipulated that is Mr. Packard?

Mr. Whelan: You don't mean the gentleman off——

A. No, the one directly behind you.

Mr. Whelan: That is Mr. Al Packard.

By Mr. Archer:

Q. Any other of those men sitting in the spectators part?

A. There is another one but he isn't sitting back there at the present.

Q. Can you fix—you said the first incident. Can you fix the approximate time of that, Mr. Welch?

A. It was approximately ten o'clock, somewhere around there.

Mr. Whelan: What day?

By Mr. Archer:

Q. And with relation to the time when the pickets commenced picketing on April 28th, can you fix the date?

A. It was a day or so after they had—the second time they had come back to picket us.

Q. There was an interval in there when they did not picket?

A. That is correct.

Q. That was at the time that there was an order of court ordering them not to picket?

A. That is right, sir.

Q. And then after there was an amendment to that [fol. 212] order they came back. Does that fix the time in your mind?

A. It was a day or so after they came back the second time, yes, sir.

Q. And that is the first incident that you are describing?

A. Yes, sir.

Q. All right. Now tell us what happened.

A. I had been seeing these cars pull in and out, you know, behind our trucks, and every time we would have a delivery go out one of those cars would pull out, so we had an exceptionally heavy load to go out so at that time I wasn't doing very much and I watched the car. Immediately after our truck had pulled out this particular car, which is a 1951 light gray or green faded Ford, it pulled out shortly behind our truck and shortly after that I pulled out behind the car. I saw the fellow that was following our truck, approximately half a block behind it, and then I went around the block, got ahead of our truck, motioned our driver to pull off to the side, and waited for a few minutes before going on to this job. I did not want to get any of the carpenters, or anything like that, in Dutch, so I contacted the contractor who was the contractor of the job. He would not let me bring the merchandise on the job, therefore, I had——

Mr. Whelan: I move to strike "He would not let me bring the merchandise on the job" as a conclusion and [fol. 213] opinion of the witness and a hearsay statement.

The Court: I will sustain the objection.

By Mr. Archer:

Q. You are not permitted, Mr. Welch, to tell what the contractor told you, it being hearsay. Was the material that was on the truck delivered directly to that job on that occasion?

A. No, sir.

Q. Where did it go?

A. I sent it to another lumber yard and they took and delivered it to the job.

Q. Where did you send it?

A. To the Pine Tree Lumber Company.

Q. Do you now recognize who was driving that Ford automobile?

A. That driver isn't in the courtroom at present.

Q. Was that all of that incident?

A. Yes, sir.

Q. Was there another one?

A. Yes, sir.

Q. Tell us, if you can, the approximate date of that incident and what happened?

A. I don't remember the approximate date. It was several days after this first incident and so we had a load going to another job there.

Our truck pulled out and shortly afterward this [fol. 214] car sped out from its parking place across the street from our lumber company and immediately, well, I went with Mr. Garmon to follow that particular car, and follow the truck. It had gotten quite a distance ahead of us so we cut off on another street because we knew where the truck was going and to what job it was going. We pulled out and got ahead of our truck and we set on the hillside and waited for our truck to pass by. About a half block following our truck was a 1951 or 2 DeSoto, black, and in that car that gentleman sitting right over yonder with the glasses on that I identified first, was one of the occupants.

Q. Do you recognize in the audience now the other occupant of that car?

A. I can't truthfully say whether the other occupant is in the courtroom or not.

Q. Then what happened?

A. Well, when we saw them following our truck, that was all that I wanted to see and we turned around and came back to the yard. Shortly after this car came back and parked across the street.

Q. Have you ever seen any of these cars being operated by the representatives of the union circling any of your jobs?

Mr. Whelan: Objected to as being leading and suggestive.

The Court: Overruled.

[fol. 215] By Mr. Archer:

Q. Did you understand what I meant, Mr. Welch?

A. I thought the Judge said the question was overruled.

Q. No, you may answer the question. Did you ever see these cars circling your jobs?

A. On different occasions, yes.

Mr. Archer: You may cross-examine.

Cross-examination.

By Mr. Whelan:

Q. What is your capacity out at the Valley Lumber Company?

A. Sales clerk.

Q. Sales what?

A. Clerk.

Q. Clerk. You didn't attend a meeting of the employees on March 26, 1953, where Mr. Collins was present and discussed the contract with the employees in the yard, were you?

A. I did not.

Q. You are the gentleman who took up the collection to put the ad in the paper, are you?

A. I am, yes.

Q. Who wrote the ad?

A. With the bookkeeper's assistance and some more [fol. 216] knowledge that we had picked up from a previous report, we made up the ad.

Q. Did you consult with Mr. Max Garmon?

A. In that particular, no.

Q. Had you consulted with him prior to that time?

A. No.

Q. How was this ad paid for, in cash or by check?

A. In cash.

Q. Who paid for it?

A. I paid for it this morning when I got the bill.

Q. You paid for it this morning?

A. Yes, sir.

Q. Now this first incident that you told us about, to go back, took place the day following the return of the pickets, is that right?

A. Within a day or so of that. I don't exactly remember the date.

Q. That is the first incident that you remember of any union representative following your trucks?

A. That is the first incident that I checked up on.

Q. And the order restraining the pickets was dissolved on Monday, May 18, and the pickets came back out in front of the Valley Lumber Yard on Tuesday, May 19, do you remember that?

A. I knew it was around Tuesday, but I didn't know what the exact date is. I didn't remember.

[fol. 217] Q. The first incident you have told us about you say took place the day following the return of the pickets?

A. A day or so. Within that range, yes.

Q. Then two or three days after that first incident you and Mr. Max Garmon followed this Pontiac automobile?

A. No.

Q. When was it that you followed the Pontiac automobile, or saw the Pontiac?

A. I did not follow a Pontiac.

Q. You didn't follow the Pontiac automobile? What did you do?

A. I didn't follow any Pontiac.

Q. Well, DeSoto. Did you follow a DeSoto?

A. Yes.

Q. When was that?

A. That was several days later, maybe three or four or five or six days, something like that.

Q. Following the first incident?

A. Following the first incident.

Q. So that if the pickets returned on Tuesday, May 19th, this incident of following the DeSoto automobile would probably have been as late as Tuesday, May 26th, is that right?

A. It could have been as late as Tuesday, or Wednesday of the next week, yes.

Q. Tuesday or Wednesday of the following week?

[fol. 218] A. Somewhere in there.

Q. And how far did you follow this DeSoto automobile?

A. I didn't follow it.

Q. What did you do in connection with the DeSoto automobile?

A. I knew where the merchandise was going, therefore, we pulled out on a different road, a different street, and got ahead of our truck and we set on a hillside there and waited for that car to pass following our truck and about a block or about a block and a half behind our truck came that car, just moseying along right behind it.

Q. And after you had seen that then you turned around and went back to the plant?

A. Then we turned around and went back to the yard.

Q. And you don't call that following the DeSoto automobile?

A. Well, yes I do in a way, but not actually following the automobile, no.

Q. More observing than following, isn't that right?

A. Observing.

Q. And you think that Mr. Taylor was driving that automobile?

A. Yes, sir.

Q. And you don't know who the other occupant of that automobile was?

A. I didn't pay any attention.

[fol. 219] Q. Could that DeSoto have been a 1950 rather than a '51 or '52?

A. It could have been, yes.

Mr. Whelan: That is all I have, Mr. Archer.

The Court: Any further questions, Mr. Archer?

Mr. Archer: No, I have no further questions.

The Court: You may step down.

Mr. Archer: Mr. Collins, will you resume the stand, please?

MORRIS COLLINS, recalled as a witness for and in behalf of the plaintiffs under the provisions of Section 2055 of the Code of Civil Procedure, and having been previously duly sworn, resumes the stand and testifies as follows:

Mr. Archer: We are recalling Mr. Collins under Section 2055 of the Code of Civil Procedure.

The Court: You may draw that up closer if you wish, Mr. Collins.

The Witness: Thank you, Judge.

Examination by Mr. Archer:

Q. Mr. Collins, when did the San Diego Building Trades Council and its affiliated unions decide to start this invitational, so-called invitational campaign in the lumber yards?

Mr. Holt: I am going to object to it as argumentative. [fol. 220] The Court: Overruled.

A. Well, that would be hard to say. We conduct an organizing campaign in all unorganized fields within the building trades that there are which includes all construction and supply. These go on continuously.

By Mr. Archer:

Q. Well, this invitation to—for the men to join is not anything of any recent origin, is it?

Mr. Holt: Just a minute. I am going to object as calling for a conclusion. There is no showing that the Building Trades put out the invitation. There has been a differentiation made to your Honor already that the Carpenters are not a member of the Building Trades and I think he is basing his question on something not in evidence.

Mr. Archer: You have looked at this——

Mr. Holt: No, I was waiting for you to do the work so I could look at it. Counsel, what I should like to do, with the Court's permission, when we find any specific parts, that that part be read into the record rather than that these books——

Mr. Archer: Certainly. I don't intend to put your books in evidence.

Mr. Holt: Is there any other part?

Mr. Archer: Page 467.

Mr. Holt: Go ahead. Could you show us, Counsel? We don't find it quickly here.

[fol. 221] Mr. Archer: And 475.

Mr. Holt: All right.

Mr. Archer: 477.

Mr. Holt: All right.

Mr. Archer: Then you have the slips in the other book, those I had had a chance to mark.

Q. Directing your attention to the Executive Board Meeting minutes of September 18, 1951, that refers to the Executive Board of the San Diego Building Trades Council, does it not?

A. Yes.

Q. I direct your attention to an item numbered 2 in those minutes reading as follows:

"To concur in the Business Manager's request for permission to circularize contractors in northern part of County in effort to orzanize lumber yards." Was that at or about the time you commenced this invitational effort with the lumber yard's employees?

A. No.

Mr. Holt: I am going—Just a minute. If Counsel is referring to the picket poster which I presume he is, I will object on the grounds it is based on something not in evidence.

The Court: What is this date?

A. September 18, 1951.

Mr. Holt: It is an argumentative question, is what it [fol. 222] is, based on something not in evidence. There is no showing up to now the Building Trades put any pickets out at all. Let him find out before—with his snide remark of "invitational" because we say invite employees. I say it is argumentative for that reason.

Mr. Archer: Well, I recall, Counsel, I first heard that term "invitational picket line" in your opening statement in this case. I had never before heard it. I had heard of

organizational, educational and inspirational, but this was the first time I heard invitational and I am simply quoting you.

The Court: I think he may use the term. Overruled. Proceed.

By Mr. Archer:

Q. Reverting back to the beginning of the minutes it reads: "By separate motion, seconded and carried, the following recommendations were made for council's consideration" and the second one was "To concur in the Business Manager's request for permission to circularize contractors in the northern part of County in effort to organize lumber yards", is that right?

A. That is correct.

Q. Now in the minutes of the Council for the same date and recorded on page 467 of the Minute Book is noted this entry, is it not, "Reported that the Building Trades Council, the Teamsters, the Laborers and Carpenters are [fol. 223] working together to organize building material and lumber yards in the northern part of the County and that the present activities"—or maybe it is "activity is being concentrated at Oceanside and Encinitas". Is that recorded in your minutes?

A. It is.

Q. Directing your attention to the Council Meeting minutes of October 2, 1951, as recorded on page 475 of the minutes: "Reported that the lumber yards are feeling the effect of our organizational campaign and are complaining about the loss of business. Reported that the Carpenters have signified their desire to no longer cooperate with the Building Trades Council, but that the Carpenters' representative——"

A. What has that got to do with it?

Q. I don't know.

Mr. Holt: I ask that be stricken.

Mr. Archer: It goes on "Reported that the Carpenters have signified their desire to no longer cooperate with the Building Trades Council, but that the Carpenters' representative in the northern part of the County is continuing to cooperate in the organizational campaign for the lumber

yards". Directing your attention to the Executive Board Meeting minutes of October 9, 1952, as recorded on page 477 of your minutes, directing your attention to item number 6, it reads as follows, does it not: "To authorize [fol. 224] expense for lumber yard program"?

A. It reads that way, yes, sir.

Q. So as of, at least, October of 1952, the San Diego Building Trades Council was financing this organizational program is that correct?

A. No, that is not correct.

Q. Was it financing the invitational program?

A. No.

Q. What was it financing?

A. The expenses of holding meetings with contractor-employer groups, that is all.

Mr. Archer: Thank you.

The Court: May I inquire, when did the Carpenters pull out of the San Diego Building Trades Council?

A. Oh, that has been roughly three years ago.

The Court: Very well.

By Mr. Archer:

Q. Directing your attention to the Executive Board Meeting minutes, as they are entitled under date of February 5, 1952, and is this the same body, same executive body whose minutes we have just referred to?

A. They are.

Q. Directing your attention to the first paragraph following the date and time of the meeting, it reads as follows, does it not: "By separate motion, seconded and carried, the following recommendations were made for the [fol. 225] Council's consideration:" and the sixth item on the agenda, or the sixth motion made and carried reads as follows: "To approve placing of pickets on non-union lumber yards in San Diego County", does it not?

A. Yes, sir.

Mr. Holt: What date is that, please?

Mr. Archer: February 5, 1952.

Q. Directing your attention to the Council minutes of February 5, 1952, specifically on page 19, it is recorded as follows: "Reported that the organizing campaign in the lumber yards in the northern part of the county had gotten to the point where pickets seemed necessary and that although the representative of the yards promised to invoke an injunction the minute we established a picket line, we will probably have pickets on some of these yards shortly". Is that what is recorded under date of February 5, 1952?

A. Yes, sir.

Q. Under date of June 17, 1952, in the minutes of the Council, there is this entry, is there not, under the caption "Communications": "From N.L.R.B., copy of notice to Northern San Diego County Lumbermen's Association advising that the case against the Truck Drivers, Local No. 36, District Council of Carpenters and San Diego Building Trades Council has been deemed as insufficient evidence to issue a complain"—there is no "t" on the word, and——

Mr. Whelan: What is the date on that?

[fol. 226] Mr. Archer: June 17, 1952. It reads as follows: "From National Labor Relations Board, copy of notice to Northern San Diego County Lumbermen's Association advising that the case against the Truck Drivers, Local No. 36, District Council of Carpenters and San Diego Building Trades Council has been deemed as insufficient evidence to issue a complaint and within ten days a review may be had if good cause is shown." That is so recorded, isn't it?

A. It is.

By Mr. Archer:

Q. Directing your attention to page 2 of the San Diego County Building and Construction Trades Council minutes of a meeting of February 3, 1953, is it therein reported as follows: "Secretary Collins has succeeded in signing another lumber yard in northern San Diego County, the Home Builders Store in Carlsbad. The organizing campaign seems to be gathering momentum and it is hoped other yards will sign soon. It seems like a very short time since we completed negotiations and now we are about to begin the merry-go-round once again". Is that what is so entered therein?

A. It says that but I don't think you are clear on the latter part.

Q. What?

A. It says that but I don't think you are clear on the latter part. That is not part of the report on the [fol. 227] lumber yards. The merry-go-round is referring to negotiations to renew existing agreements.

Q. Well, it is in the same sentence, is it not, as the organizing campaign?

A. There is a period here after the word "soon". Right there.

Q. I may be in error in that. There may be a period following the word "soon". The merry-go-round then referred to the negotiations and not to the organizing campaign?

A. That is true.

Q. You are the Secretary, as I understand, of the San Diego County Building and Trades Council, are you not?

A. I am, sir.

Q. And you supervise, at least, the keeping of those minutes?

A. Indirectly, yes, sir.

Q. Is there any reference in those minutes any place to a campaign to invite or inspire the employees of the Valley Lumber Company to join either of these unions?

A. I don't know, sir.

Mr. Archer: That is all.

Mr. Holt: No questions at this time. We reserve our right to question him when we call him.

Mr. Archer: Just a minute, please.

Q. Directing your attention to the minutes of the Executive Board meeting of October 16, 1951, recorded on [fol. 228] Page 483 of Plaintiffs' Exhibit 4 for identification, there is recorded the following — Indicidentally, whose handwriting is that?

A. That is the girl's handwriting. She copies the minutes into the book from the notations we make up.

Q. Your secretary or assistant?

A. Yes.

Q. The following entry: "The organized campaign to unionize lumberyards in the northern part of the county continues to progress, but none have signed up as yet. It

appears that we will have a meeting with the lumber yard owners within a week and at that time we will learn if there is a chance of signing them up easily or if there is going to be an all-out war". Is that what is there reported?

A. That is correct.

Mr. Archer: We have finished with that one.

The Court: Is that all, Mr. Archer, of this witness?

Mr. Archer: That is all, your Honor, except for a few pages in this record that I did not have a chance to check at noon, and I have nothing further at this time.

Mr. Holt: We wish to reserve our right to examine him.

The Court: Yes.

Mr. Archer: I have nothing further.

The Court: You may step down.

Mr. Archer: Mr. Garmon, will you resume the witness stand and take with you your records, please?

[fol. 229] William A. Garmon, one of the plaintiffs herein, recalled as a witness for and in his own behalf, and having been previously duly sworn, resumes the stand and testifies further as follows:

Further cross-examination.

By Mr. Whelan:

Q. Mr. Garmon, do you have the big book showing the record?

A. Here it is.

Q. Those are the permanent records of the Valley Lumber Company, are they?

A. Yes, sir.

Q. And the typewritten sheet which is attached to these different pages shows respectively the gross income during the months of March, April and May of 1951?

A. Yes.

Q. March, April and May of 1952 and March, April and May of 1953?

A. Yes, sir.

Q. The computation that appears on each of these typewritten sheets was prepared by you or under your direction, was it?

A. Yes, sir.

Q. That shows for March of 1951, a gross sales of $40,072.55?

A. That is right.

[fol. 230] Q. And for April of 1951, gross sales of $32,354.92?

A. That is correct.

Q. And for May of 1951, gross sales of $28,266.00?

A. That is right.

Q. Now when we get over to March of 1952, it shows a gross sale of $38,935.15?

A. Correct.

Mr. Todd: For what month?

Mr. Whelan: March of 1952.

Mr. Archer: Will you read that figure again, please?

Mr. Whelan: $38,935.15.

Mr. Archer: Thank you.

By Mr. Whelan:

Q. And for April of 1952, a gross figure of $39,735.92?

A. That is correct.

Q. And for May of 1952, $37,117.52?

A. Correct.

Q. Now for March of 1953, your gross sales were $44,015.92?

A. Yes, sir.

Q. And for April of 1953, $46,588.21?

A. Yes, sir.

Q. And for May of 1953, $41,134.45?

A. Yes, sir.

Q. Now each of those figures, of course, show the—

[fol. 231] not only the sales at the Escondido yard but the sales in the Borrego yard?

A. In these amounts?

Q. Yes.

A. No, sir.

Q. Did you say "no"?

A. No. You mean this—it includes what we sell to the Borrego yard.

Q. In other words, we will start here in March, 1952, and it shows a gross sales of $38,935.15?

A. Uh-huh.

Q. Then you have got below that "Sales to Borrego yard, $7,995.84"?

A. That is right.

Q. Then the figure $30,939.31?

A. Correct.

Q. That means that that was the figure representing the sales out of the Escondido yard?

A. No. This is all sold out of the Escondido yard but we keep accounts separately. This is wholesale that we sell there. I just wanted to show it.

Q. But the gross figure of $38,935.15 does include sales to the Borrego yard, doesn't it?

A. That is right, yes.

Q. That is true in each case?

A. In each case, yeah.

[fol. 232] Q. Now there wasn't any picket line around the Borrego yard, was there?

A. No, sir.

The Court: Does this item in the book show what the Borrego yard sold or just what you sold them?

A. Just what we sold them.

The Court: Not what they sold?

A. No.

Mr. Holt: Will the Court give us just a moment, please?

(Off the record discussion between counsel for the defendants.)

Mr. Whelan: We are going to take these sheets, the total compilations off and use those. We can do that during the recess.

Q. Mr. Garmon, you have your books which show the dates of the raises given to your employees?

A. Yes, sir.

Q. And taking the record sheet for the year 1952, with reference to the salary of Jack Rutledge, it shows that on the first of the year he was receiving salary of $73.50 a week?

A. Yes, sir.

Q. That he was increased to $75.00 a week on July 26, of 1952?

A. That is right.

Mr. Holt: He knows that.

[fol. 233] By Mr. Whelan:

Q. July 26 of 1952, $75.00 and August 16, 1952, to $79.20?

A. Yes, sir.

Q. And that rate of pay was continued until March 28th of 1953, at which time his salary was raised to $84.18 a week?

A. That is right.

Q. When we were talking the other day you said that the men received so much per hour but these books disclose they were paid by a weekly rate or salary, isn't that right?

A. Yes.

Q. Now I also noticed in checking through these books that Mr. Unruh, for example, prior to August the 16th received $60.07 per week, and on August 16th of 1952, he was raised to $66.00?

A. Uh-huh.

Q. Then on November 22, of 1952, his pay was raised to $70.40?

A. That is right.

Q. And it remained at that until the 28th of March, 1953, at which time his pay was raised to $77.28 a week?

A. That is right.

Q. With relation to James Rollins, his pay from the first of the year up to August the 16th, 1952, was $71.40 a week?

[fol. 234] A. That is right.

Q. On August the 16th, 1952, his salary was raised to $77.00 a week?

A. That is right.

Q. And he continued to receive $77.00 a week until the 28th of March, 1953, at which time his pay was raised to $82.80 a week?

A. That is right.

Q. Now the St. Malo Lumber Company entered into a contract with the Teamsters, Local No. 36, and the Millmen, Local No. 2020, on August 15th of 1952, isn't that right?

A. I don't know.

Q. You do remember that you were present at that dinner over at the Beach Hotel in Oceanside on August 14, 1952?

A. Yes.

Q. And the other lumber yards, the members of the Northern San Diego County Lumbermen's Association, were present?

A. Yes.

Q. And Mr. Collins was there representing the unions?

A. That is right.

Q. Well, contracts were discussed?

A. To some extent.

Q. Yeah. Now this last wage increase which went into effect on March 28, 1953, was after Mr. Collins had told you, [fol. 235] two days after Mr. Collins had told you, that the men that he had talked to were desirous of joining the union, isn't that right?

A. I wouldn't want to say two days. I don't remember the dates.

Q. Let's make it one or three. It was after Mr. Collins talked to you, anyway, wasn't it?

A. I wouldn't say it was because that had no effect on it.

Q. Isn't it true that all the men in the yard received raises at the same time, August 16, 1952, and March 28, 1953?

A. I don't believe that is true. No, sir. This one did (indicating). This one (indicating) didn't.

Mr. Archer: What was the name of the man you say did not?

A. Breedlove.

By Mr. Whelan:

Q. Is Mr. Breedlove still working there?

A. Not now.

Q. He left there in November, 1952?

A. Yes.

Q. Of the men that are still working for you, isn't it true that they all got raises on March 28, 1953?

A. Let me check back here for a second and see. This man here got a raise on 7-5-52.

[fol. 236] Q. 7-12, isn't it?
A. 7-5. No, 7-12.

Mr. Archer: Give us the names as you go along.
Mr. Whelan: That is Unruh.
Mr. Holt: That is the 16th and also the 28th?

By Mr. Whelan:

Q. I have examined the witness in connection with this man's salary. He got the increase referred to on July 12 of $3.07 a week, but then on August the 16th he gets a raise of $3.00 more to $66.00 a week?
A. And then again on 11-22-52.
Q. He gets a raise to $70.40?
A. Yes, sir.
Q. That was about a week——

Mr. Holt: How about March 28, 1953?
Mr. Whelan: On Unruh?
Mr. Holt: Yes.
Mr. Whelan: He got a raise on March 28th, according to these records, I believe.

A. Yes.

By Mr. Whelan:

Q. To $77.28 a week?
A. Yes.
Q. Now with reference to the raise Mr. Unruh got on November 22nd, that was just one week after Mr. Collins left that form of contract with you, wasn't it?
[fol. 237] A. I wouldn't say that is true.
Q. All right. Well, is there any of your present—Are there any of your present employees who didn't get a raise on March 28, 1953?
A. No, sir.
Q. And——
A. That is—I will take that back. Some of our employees did not, but our men in the yard——
Q. I am not talking about the bookkeeper or salesman in the office, but about the men in the yard. They all got the raise on March 28, 1953?
A. Yes.

Q. Those men in the yard also got a raise on August 12th, 1952, that is, what men were still working for you—August 16, I mean.

A. Not all of them. That isn't true of all of them, is it?

Q. I thought so. I might be wrong.

A. 7-12.

Q. You are getting back to that same Unruh. He got a raise on August 16th?

A. Yes. He got one on 7-12. Let's go back here. Breedlove, he didn't get a raise then.

Q. But the question I asked you was the men still working for you now. Isn't it true they all got a raise on August 16, 1952? This is James Rollins, and he did.

[fol. 238] A. And Rutledge did. There was three men that got a raise.

Q. Well, all of the men that are now working for you in the yard that were working for you on August 16, got raises on that date?

A. Yes.

The Court: We will take our afternoon recess at this time for fifteen minutes.

(Recess.)

WILLIAM A. GARMON, one of the plaintiffs herein, recalled as a witness for and in his own behalf, and having been previously duly sworn, resumes the stand and testifies further as follows:

Further cross-examination.

Mr. Whelan: These are the computations made by Mr. Garmon, or under his supervision, of the monthly gross business for the months we were mentioning, March, April and May of 1951, 1952 and 1953. May we put them in as one exhibit?

The Court: Yes. May be received as Defendants' B.

By Mr. Whelan:

Q. Mr. Garmon, there was some testimony here this morning that the customary profit on the gross sales was about 25%. I think that testimony was given by either Mr.

Wyland of the Pine Tree Lumber Company, or Mr. Hughes [fol. 239] of the Escondido Lumber Company. Would that be true as far as your business was concerned?

A. 25% gross?

Q. Yes.

A. I would say so.

Q. Now—You mean 25% of the gross would be the net profit, right?

A. Well, 25% gross would be our net profit, yes.

Q. What was that?

A. 25% gross.

Q. Well——

A. Expenses have got to come out of that.

Q. You mean the expense comes out of the 25%?

A. Surely.

Q. Well, how much would be the expense, then, that would come out of that 25%?

A. I don't get just what you are requesting.

Q. Well, what would be your net profit per year in the management of this business, the net profit of the Valley Lumber Company?

A. Well, are you going to take a thousand dollars or what am I going to base it on? A hundred dollars?

Q. Well, you did, you think, roughly $500,00- last year. How much of that would be net profit.

A. About seven per cent.

Q. About seven per cent would be net profit?

[fol. 240] A. Yes.

Q. And that means after deducting all operating expenses seven per cent of the gross sales would represent the net profit?

A. Yes.

Q. Are you and Mr. J. S. Garmon and Mr. Max Garmon equal partners?

A. Yes.

Q. Now does the partnership file an income tax return?

A. Yes, sir.

Q. And in the income tax return you showed your volume of business for the last year and your expenses and the amount of net profit of the partnership?

A. Yes, sir.

Mr. Whelan: I believe that is all.

Further redirect examination.

By Mr. Archer:

Q. Mr. Garmon, during the year 1951 did you grant periodic wage increases to some of your employees?

A. Yes, I did.

Q. Have you also in all these years given your employees Christmas bonuses?

A. Yes, sir.

Mr. Archer: That is all.

[fol. 241] Mr. Whelan: That is all. Thank you.

Mr. Archer: Plaintiffs rest, your Honor.

Mr. Holt: May I take three or four minutes, your Honor, to make a motion for a non-suit?

The Court: Yes.

MOTIONS FOR NON-SUIT AND DENIAL THEREOF

Mr. Holt: First of all I should like to make a motion for non-suit on the ground that the Court, of whom I speak respectfully—on the ground that the plaintiffs have not exhausted their remedies under the laws of the Congress of the United States and relative to their not doing so Mr. Waddell frankly states they have made no complaint and done nothing about it.

I call your attention to 111 California Appellate Reports, 2nd Series, at page 221, Woodard versus Broadway Federal Savings and Loan Association, and read:

"The doctrine of exhaustion of administrative remedies applies where a statute provides an administrative remedy, even though the terms of the statute do not make the exhaustion of the remedy a condition of the right to resort to the courts. The doctrine, whenever applicable, requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention."

I shall not proceed further in the field because we have heretofore given you our citations in that regard.

[fol. 242] Second, the Capitol Service case, of course, we have called to your Honor's attention heretofore and your

Honor has it in mind, I am sure. Assuming they were in the court here properly now under all the old cases we have referred to, and the new cases also, we have the absolute right to picket under the constitution and under the cases not only primarily, but as a secondary boycott. Your Honor will remember the Fortenbury case, 16 California 2nd, which has not been modified or changed in this state. The unions in that case followed from one place to another and the case was brought on the proposition the unions may not carry on a secondary boycott and the courts held, and the Supreme Court held, that they may do so, not only primary but secondary, so, basing our conclusion on those matters, I have called to your attention, we move for a non-suit.

The Court: Your motion will be denied.

Mr. Whelan: With reference to the Teamsters, Local No. 36, the only place it has been mentioned in the case is in the contract which was offered in evidence, but there has been no activity shown on behalf of the Teamsters, Local No. 36, and I would think the motion might be granted as to that organization.

The Court: That motion will be denied.

Mr. Holt: Mr. Collins, please.

[fol. 243] Morris Collins, called as a witness for and in behalf of the defendants, and having been previously duly sworn, resumes the stand and testifies as follows:

Direct examination.

By Mr. Holt:

Q. Please state your name again for the record.

A. Morris John Collins.

Q. Please state what your occupation is.

A. The office I hold in the Building Trades Council is that of Secretary.

Q. How long—withdraw that. What is the capacity of your work, what do you do?

A. Many things. One is organizing all those things which are designated as coming under the Building Trades by the National A. F. of L., which is the organization of

new contractors, the organization of material yards that supply building material products, and the manufacture of building materials.

Q. Does that include the attempt to organize the employees of labor or of lumber yards?

A. It does.

Q. Does that include the work of attempting to enter into contracts with the owners of lumber yards?

A. It does after we represent the employees.

Q. Have you attempted, in your duties, to become [fol. 244] acquainted with the rules of the N.L.R.B.?

A. We have.

Q. And have you received advice relative thereto?

A. We have, and we receive it regularly.

Q. From whence do you obtain your advice?

A. By subscriptions to Commerce Clearing House Labor Law Reports and by consultation with attorneys who have followed those particular reports.

Q. Have you learned the capacity and the field in which you believe you may move in your industrial strife through hearings and complaints that have been made with the National Labor Relations Board?

A. We have always hoped so.

Q. You try to learn and become educated thereby?

A. We do, yes, sir.

Q. Have you been attempting in the capacity which you spoke of in your work, to organize the employees of the lumber yards of the northern part of the County of San Diego, California, during the past several years?

A. We have.

Q. Relative thereto did you—was there organized the employees or were there organized the employees of the St. Malo Lumber Yard?

A. When I entered the picture, no, they were not organized.

Q. When was that?

[fol. 245] A. When did——

Q. When did you enter the picture relative to St. Malo?

A. Oh, approximately the beginning of 1952, or latter part of 1951.

Q. Did you carry on negotiations with the employees of the St. Malo Lumber Yard?

Mr. Archer: To which we will object, your Honor. There is no issue as to how they organized some other lumber yard at some other location and at some other time.

Mr. Holt: Do I not have a right to show the custom of the business, the intent with every other yard they have organized? They have done so regularly——

The Court: We are only concerned with how they organized this one. I don't think it would help to show how they organized the other ones. I will sustain the objection.

Mr. Holt: I will offer further evidence. I never transgress in the field the Court indicates it doesn't want me to go, but I wish to inform your Honor that I wish to offer in evidence in the form of conversations that he had with the plaintiffs in this case, telling them how St. Malo had been organized and that they had organized the employees first and had to get their consent to represent them first. I think that would be competent to explain to these gentlemen the process.

[fol. 246] The Court: No, I don't think so.

By Mr. Holt:

Q. Were you at a meeting—withdraw that. When was it that you entered the picture relating to trying to organize the plaintiff lumber yard?

A. I would say that it was roughly about June, 1952, when we first had meetings of management that involved the Valley Lumber Company.

Q. Where did those meetings take place?

A. Most of them took place on the coast. One I can remember took place at the St. Malo Lumber Yard, of which there was other owners, and at the Beach Hotel and at the Carlsbad Hotel.

Q. Were the plaintiffs or either of them present?

A. I don't remember them present at any meetings specifically other than the Beach Hotel in Oceanside.

Q. There was a meeting at the Beach Hotel in Oceanside and which plaintiff was there?

A. Mr. Bill Garmon I remember as being there.

Q. Did you discuss with the owners of the lumber yards, including Mr. Bill Garmon, the situation of trying to organize the lumber yards?

A. I did, sir.

Q. What did you tell him?

A. Well, the big issue they had was our union shop clause and they raised the issue of how we could organize [fol. 247] under a union shop clause and it was explained to them past practices within the building trades——

Mr. Archer: To which I object upon what may be the past practices of the Building Trades, and it is incompetent, irrelevant and immaterial to the issues here as to what they did in this particular campaign.

Mr. Holt: If your Honor please, I should like seriously to be heard about this matter. Mr. Bill Garmon said that they had been told to sign a contract and that they were to sign it, period. May we not show that that isn't true? May we not show our people have at all times been ready to sign a contract only after we represent the employees, because that is the legal way. That is what we found from the National Labor Relations Board. May we not show they told them not only in the Beach Hotel, but at other times, to show the whole res gestae, to show their intent, to show whether or not they were legally proceeding.

The Court: You may show what they told the Garmons, and only that which they told them. What they did in other cases wouldn't make any difference.

Mr. Holt: Very well.

Q. What did you tell Mr. Garmon and the other lumber yard owners at that time?

A. I told them we had a union shop clause in the contract and that the method would have to be handled such that the employees were members of our union first. We [fol. 248] desired to explain thoroughly to the management all of the ramifications of the union operations if they were operating under a union agreement as the one we had devised for that operation.

Q. Did you to any extent go into the proposed contract that you thought would be—that they should be educated or told about?

A. We went through the entire contract that evening.

Q. That was at the Beach Hotel?

A. That was.

Q. And later then did you start meeting with Mr. Bill Garmon at his place of business?

A. I did.

Q. About when was that?

A. I believe the first contact that I made with him was on or about November 15, 1952.

Q. Do you remember who was present at that time?

A. There were others present, but in the office where we were speaking was only Mr. Bill Garmon.

Q. What discussion did you have with him at that time, as far as you can remember?

A. It was more or less a personal meeting. I left him a copy of the union agreement, the same one discussed at the Beach Hotel, and asked him to look it over and I would stop back and see what he thought about it.

Q. And now at that time did you attempt to sneak [fol. 249] around into the yard or the homes of the men or anything of the sort, to talk to them or did you go to management first to discuss the whole situation?

A. I went to management first.

Q. What did you tell them to do about the contract?

A. Study it and see what his comments were and see if he was in a position whereby were we to report his employees were ready to join, could he be a party to that agreement.

Q. What did he say?

A. On that occasion?

Q. On that occasion.

A. He says, "Well, thank you. I don't have a copy of this although I was in the meeting at the Beach Hotel. I would like to look it over very closely."

Q. Did you tell him to sign that at that time?

A. No, I didn't.

Q. At that time did you tell him or indicate to him you wanted him to sign that before you represented the employees?

A. I did not.

Q. When did you meet him again?

A. From then on I used to stop in every two or three or four weeks, whichever was convenient in working that territory.

Q. Will you tell us what conversations you had with [fol. 250] him and take them in chronological order from the time you left the first contract with him?

A. We had many friendly conversations. I would generally come in unannounced and if he were in and I would wave to him, then he would motion me into the office. We would talk about the contract, about the unions involved, generalities not related to the contract, and, in other words, my idea was to establish friendship.

Q. Did you in any way attempt to see his employees secretly to disrupt his business during that period of time?

A. I did not.

Q. Call them at their homes?

A. No.

Q. Sneak out the back door during rest periods, or anything of that sort?

A. I did not.

Q. When was the next meeting you had with him at which the contract was discussed?

A. There may have been discussions of part of it up to a meeting that I had around February 1, 1953. That is one I more or less specifically remember, however, we had many meetings.

Q. Let's go to the February 1st meeting then and see what was said. First of all, tell us who was there?

A. Accompanying me was Mr. "Spud" Taylor.

[fol. 251] Q. Who else, if anyone, that you remember?

A. That is all I remember, other than Mr. Garmon.

Q. Mr. Bill Garmon?

A. Yes.

Q. Tell us what took place?

A. At that one, the one I specifically remember of mentioning the procedures for signing the union agreement.

Q. Tell me what you said?

A. We explained to him at that time that it was a very simple procedure and I cited how we did it in the St. Malo and Encinitas cases.

Q. What did you explain to him?

A. I told him after the meeting at the Beach Hotel which was the reason that I stayed at the Carlsbad Hotel that evening and called the representative of the Teamsters, Mr. Taylor, and Mr. Boyle—excuse me—a representative of the

Millmen, Mr. Taylor, and a representative of the Teamsters, Mr. Boyle, to have them meet me at the hotel in the morning. From there we met and discussed the activities of the employers' meeting at the hotel and we decided then from the feeling we had at the meeting, that I had at the meeting, it might be a good time to call on the Encinitas and St. Malo Lumber Companies. We left the hotel and called on the Encinitas——

Mr. Archer: I object to this meeting in the Carlsbad Hotel between the representatives of the unions and how their [fol. 252] organizational efforts against St. Malo and Encinitas progressed as not within the issues.

Mr. Holt: I want to ask the question to find out if this is clear.

Q. Are you telling me now what took place at the hotel or what you told Bill Garmon.

A. What I told Bill Garmon.

The Court: Overruled.

By Mr. Holt:

Q. Please go ahead.

A. I explained to him in the morning that we called on Mr. Gauthier——

Q. Who is he?

A. The owner of the Encinitas Lumber Company.

Q. All right.

A. And they said they are ready to sign the agreement. We explained to him he could not sign until we represented his employees and would he call them into the office, which he did. We then read the agreement to the employees for the first time, answered their questions, and they all signified their willingness to join the union by signing applications in either the Teamsters or Millmen's union, and then I laid four contracts on Mr. Gauthier's desk and I said, "Now, Mr. Garmon, under those circumstances it would be perfectly in order for you to sign the contracts." Later that day I explained to him that we moved the same day up to the St. [fol. 253] Malo and went through a like procedure of calling in the employees and reading the agreement to them, asking them if they felt they would be doing the right thing.

We also explained to them it wasn't exactly what we wanted and we realized it wasn't exactly what the employers wanted, but this was the agreement we had been talking about for a long time, so if they felt they could operate under it, and then we laid it on Mr. Meredith's desk and he signed for the St. Malo.

Q. How far did the procedure go about your becoming the representatives of these men? I don't quite get it in my mind as to whether the men merely signify orally that they would join the union or said you might represent them, or did they actually join the union there?

A. Actually joined right there by filling out applications and all. There is one formality and that is after their applications are made and then they go down to the local and complete what is necessary there.

Q. You explained this in detail to Mr. Garmon on February 1, 1953?

A. I did.

Q. What took place at that time?

A. Well, it went off into idle chatter and that is all.

Q. What did he say he wanted to do about it?

A. He didn't say.

[fol. 254] Q. What did you fellows do?

A. We just left.

Q. When did you come back?

A. Well, let's see.

Q. About. By the way—withdraw that. Did you make any suggestion to him about getting in touch with Mr. Meredith and Mr. Gauthier?

A. Yes, I did. One of the points of the conversation that day that I just happen to remember was that I had been told by the St. Malo Management that they had the best fall——

Mr. Archer: To which we object on the grounds it is hearsay.

The Court: Who were you talking to?

A. To Mr. Garmon.

The Court: Overruled.

A. I was telling him that St. Malo management had indicated to me they had the best fall volume that they had had since they had been in business and I would like very

much since he didn't know, since he was having trouble making up his mind, that since he didn't know, that he contact those two people, Mr. Meredith at St. Malo and Mr. Gauthier at Encinitas.

By Mr. Holt:

Q. Did he indicate how he felt about that?

A. He said he thought maybe he would do that.

Q. Did you meet again about February 27th, if you [fol. 255] remember?

A. Let's see. February 27th we did have a meeting, yes.

Q. And who was present at that time, if you remember?

A. As I remember it, it was just Mr. Garmon and myself.

Q. And what was said to you and what did you say to him at that time?

A. Well, if I remember that conversation, in each meeting with Mr. Garmon I asked him how he felt, or was he in a position now that we could have the employees meeting and continue our completion of the agreement, or, in other words, I should say, "Are we about ready to sign up around here?" Something like that; and he *he* says, "You have been calling on me quite frequently and I don't mind telling you I have enjoyed your conversation. I think you are truthful and I especially like the way you conducted yourself at the meeting in Oceanside. Because of this truthfulness you told us both the good and the bad of the union contract." He says, "I think it no more than right on my part that if you were to stop by about March 15th that I could give you a definite yes or no."

Q. Did you part then on a friendly basis?

A. Yes, that was a short meeting.

Q. Did you then go back on March 16th of 1953?

[fol. 256] A. I did.

Q. Who was with you at that time?

A. March 16th was——

Q. Mr. Taylor was with you?

A. Mr. Taylor was there for sure, I know, and Mr. Packard was with us, and myself.

Q. Which of the Garmons were there?

A. On that particular day was Mr. Bill Garmon and

whether Max was there all the time I don't know, but I do remember him being in the office.

Q. What was said at that time to you?

A. Well, earlier we had had a promise of a definite yes or no, so they asked for more time, as I remember it, and I remember one statement by Max that "You should be willing to wait longer, because after we sign the rest of the yards in the territory will sign within a week."

Q. What did you say to that?

A. I says that may be true, or words to that effect.

Q. Did you then go?

A. That was about all that transpired that I can recall now.

Q. Was there another meeting on March 26th, 1953?

A. Yes, yes. March 26th.

Q. Tell us about what time of the day that was, please?

A. That was in the afternoon, about 3:30.

[fol. 257] Q. At the Valley Lumber Company?

A. At the Valley Lumber.

Q. Who was present?

A. Mr. Aust and myself and we went in and asked for Mr. Garmon and he wasn't in.

Q. Do you remember who was there?

A. Yes, Stewart Garmon was there.

Q. Is he J. S. Garmon?

A. Yes.

Q. The brother, you say, of Bill Garmon?

A. Yes, sir.

Q. What did he say?

A. Well, we stood around for a while, hoping Mr. Garmon would arrive, which he didn't, and in the store there is lots of things to watch and we were looking at them and I finally says, "Would there be any objection while we are waiting if I were to step out into the yard if the men are not busy and have a meeting with them?" He indicated there was no objection and at the time the foreman was standing there and he says, "I will go see what they are doing". So he left and came back and said the men were gathered around.

Q. Who was the foreman?

A. Jack Rutledge.

Q. Did you then go out?

A. I then went out in the presence of the employees.

[fol. 258] Q. Do you remember how many men you found there?

A. Not specifically, no.

Q. About how many?

A. Five or six.

Q. Did you have a copy of the agreement with you at that time?

A. I did.

Q. And what did you do and what did you say to these men?

A. Well, the first thing was to introduce ourselves and then explained to them that this was the union agreement that we were attempting to get installed into the lumber yards in the northern county and that I would like them to give me enough time to read that agreement and then I would be happy to answer any of their questions about any parts or clauses therein.

Q. What then took place?

A. I read the agreement.

Q. Then what took place?

A. Then we had a question and answer period on the various clauses of the agreement.

Q. I take it many of the men asked you questions about what this or that meant?

A. Yes. Our agreement only calls for one week vacation the first year and two weeks after the fifth year and one of the men told me he is getting two weeks after the [fol. 259] first year, so I showed him the clause in the agreement which says, "No man shall receive a lesser wage by reason of the signing of this agreement", and I said, "It has been proven that vacations, wages, and other cost items were held as wages." I says, "We have had no difficulty in that in any of the past."

Q. Were there any other questions you remember?

A. Yes. They asked about the classification or wage rates, in other words, we have in the agreement a clause which stipulates that a man working in one classification for a certain percentage of his time and in another classification for a certain percentage of his time, that he could receive a rate of pay proportional to the time he works in each classification.

Q. If a man is more skilled in a particular field, he gets more money——

A. No. We have classification rates which stipulate different wages. If a man is operating a fork-lift—I don't remember the rate, but it would be higher than a man loading cars. For the northern county agreement we have a paragraph which stipulated he could receive a proportional rate of pay for the hours he averaged in those various classifications.

Q. Did you discuss with them whether or not they were receiving such classification pay at that moment?

A. Not individually or specifically. I did try to [fol. 260] find out which ones were acting as teamsters or yard men, or checking out lumber, and things like that. As much as we could in a meeting like that I did ask them individually what they were doing and then the opinion I had after talking to all of them was that except in one case——

Mr. Archer: To which we object on the grounds it is an opinion and calling for a conclusion of the witness.

The Court: Read it back to me.

(The record read by the reporter.)

The Court: Sustain the objection.

By Mr. Holt:

Q. Do you remember Jack Rutledge saying anything about his pay?

A. I do.

Q. Tell us what he said and what you told him.

A. He was very interested in the amount he would receive under the union agreement and he asked how come in the agreement that there was no rate stipulated for a foreman. We told him we didn't have that in the agreement but that it was—if I may stop here and say along about this time Al Packard and Spud Taylor arrived—I says I didn't know exactly what the policy was on foremen so I asked Spud Taylor and he said the policy was, if there was no mill in operation, that the rate above the highest paid person supervised was a dollar a day higher and if there was a mill in operation and the foreman had foremanship

[fol. 261] over the mill and the yard that the rate was $2.00 a day higher. So he said he couldn't agree with that either, that he figured he was entitled to more than a dollar a day above the highest rate of pay supervised, so I told him that before signing the agreement that I understand—I am getting ahead of myself. Anyway, on that particular point I told him before signing the agreement I would see what the management's reaction was to his rate of pay and let him know.

Q. When you got through with the reading of the contract and all the questions had been answered, state whether or not you addressed some question to each individual there?

A. I did.

Q. Tell us what you did and explain to us how you did it?

A. After I completed it and there appeared to be no further questions, I says, "Now, if I can complete the arrangements with the management, would you", and I pointed to each individual, "be willing to operate in accordance with this agreement and become members of either the Millmen's or Teamsters' union?" And I asked each individual around the line.

Q. What was their response?

A. The first few, the first group, they all indicated "Yes, I am willing", "Yes, I am willing", "Yes, I am willing", [fol. 262] but the last one I asked was an elderly person and he says, "Well, I am willing, but with reservation". He says, "The way I have it figured out, with the rate I am receiving now and the rate you have implied I might receive," he says, "There is such a little difference that the difference would go for the paying of the dues." That was the only outright objection and then he later says—he did some figuring about what his total would be and how much it would be under the agreement and tried to determine that by what he was receiving weekly now by the hour, and he says, "Well, I will go along with the rest of them."

Q. Did you then go back inside?

A. Yes. Sometime during these—this talking we had heard Bill was back so we stepped in to see him.

Q. Who was with you when you went inside?

A. Robert Aust.

Q. What conversation did you have with him at that time?

A. By the way, at that time I believe Spud and Al left. This was late in the evening.

Q. All right. What did you tell Mr. Bill Garmon?

A. I stepped in and I imagine with a smile on my face I said, "It appears that the men are willing to join the respective unions, however, it also appears that the specific wage rate for each individual here will take a little determination to arrive at because of the fact that the men [fol. 263] are in so many classifications. One individual told me he is doing just teamstering work where the rest tell me they work as a teamster and as a yard man and whatever happens to be—whatever work happens to be done while they are present. So we would have to average it out", and then I said that in talking to the men most of them seemed to be doing all about the same, that it would average out to be in the neighborhood of $1.75 an hour.

Q. What did he say to that?

A. He said, "Where do you expect me to get that money?"

Q. What did you tell him?

A. Of course, he told me he had put in a lot of money in the business and his income was light, that he was paying his men and treating them all very nicely but he says, "That $1.75 for all of them, I don't know". I says, "That is not specific. That is something we have to determine, but it appears it should be right around that someplace."

Q. Then what did he say as to whether or not he would give you an answer that night, or what?

A. No, he asked me if we could be at his office in a few days and let him talk to every man individually and reach some determination on what they expected out of the classifications and what, in accordance with the agreement.

Q. What did you say to him?

A. I told him sure, that that would be O. K.

[fol. 264] Q. Did you set a specific date or just wait a few days before you came back?

A. I don't remember whether a specific date was set on it, but I believe it was. I believe it was set for the follow-

ing Thursday at ten in the morning, or something like that. I could be wrong.

Q. Did you meet with him in the place of business there on April 6th, 1953?

A. I think it was at that time I called and no one was present and I came back April 6th.

Q. But did you finally come back?

A. Yes.

Q. Without having received any word up to April 6th?

A. Yes.

Q. And did you go there on April 6th?

A. I did.

Q. Who was there at that time?

A. The only one I remember that morning was Max and the foreman.

Q. All right. Was Mr. Taylor and Mr. Collins with you?

A. I am Collins.

Q. Certainly. Yes. I keep thinking of Packard.

A. Mr. Packard was with us.

Q. Was he there?

A. He was.

[fol. 265] Q. All right.

Mr. Archer: Give him the original of the script and he won't have so much trouble reading it.

Mr. Holt: You almost tempt me to tell some things on you. You better not start a war with me. You will regret it. Something that happened right back there one day.

The Court: Proceed.

By Mr. Holt:

Q. Mr. Collins, what was said at that time?

A. At that time Max was sitting in Mr. Garmon's office and he motioned us in and he announced——

Q. Was Bill Garmon there at the time?

A. No, he wasn't there. We had been told by Max, I believe it was, that he was called out of town and that he was supposed to meet with us.

Q. Then what conversation did you have about the employees, if any?

Q. What conversation did you have with him at that time?

A. By the way, at that time I believe Spud and Al left. This was late in the evening.

Q. All right. What did you tell Mr. Bill Garmon?

A. I stepped in and I imagine with a smile on my face I said, "It appears that the men are willing to join the respective unions, however, it also appears that the specific wage rate for each individual here will take a little determination to arrive at because of the fact that the men [fol. 263] are in so many classifications. One individual told me he is doing just teamstering work where the rest tell me they work as a teamster and as a yard man and whatever happens to be—whatever work happens to be done while they are present. So we would have to average it out", and then I said that in talking to the men most of them seemed to be doing all about the same, that it would average out to be in the neighborhood of $1.75 an hour.

Q. What did he say to that?

A. He said, "Where do you expect me to get that money?"

Q. What did you tell him?

A. Of course, he told me he had put in a lot of money in the business and his income was light, that he was paying his men and treating them all very nicely but he says, "That $1.75 for all of them, I don't know". I says, "That is not specific. That is something we have to determine, but it appears it should be right around that someplace."

Q. Then what did he say as to whether or not he would give you an answer that night, or what?

A. No, he asked me if we could be at his office in a few days and let him talk to every man individually and reach some determination on what they expected out of the classifications and what, in accordance with the agreement.

Q. What did you say to him?

A. I told him sure, that that would be O. K.

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ing Thursday at ten in the morning, or something like that. I could be wrong.

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A. I think it was at that time I called and no one was present and I came back April 6th.

Q. But did you finally come back?

A. Yes.

Q. Without having received any word up to April 6th?

A. Yes.

Q. And did you go there on April 6th?

A. I did.

Q. Who was there at that time?

A. The only one I remember that morning was Max and the foreman.

Q. All right. Was Mr. Taylor and Mr. Collins with you?

A. I am Collins.

Q. Certainly. Yes. I keep thinking of Packard.

A. Mr. Packard was with us.

Q. Was he there?

A. He was.

[fol. 265] Q. All right.

Mr. Archer: Give him the original of the script and he won't have so much trouble reading it.

Mr. Holt: You almost tempt me to tell some things on you. You better not start a war with me. You will regret it. Something that happened right back there one day.

The Court: Proceed.

By Mr. Holt:

Q. Mr. Collins, what was said at that time?

A. At that time Max was sitting in Mr. Garmon's office and he motioned us in and he announced——

Q. Was Bill Garmon there at the time?

A. No, he wasn't there. We had been told by Max, I believe it was, that he was called out of town and that he was supposed to meet with us.

Q. Then what conversation did you have about the employees, if any?

A. Well, he stated that the employees had all voted unanimously "no union".

Q. All right. Tell me what was said at that time?

A. Well, it was quite a blow to me. I stated that in all my experience that there was generally two reasons that employees reversed themselves; that either the management had signified strongly that they wanted no part of any union, or the management had twisted the meaning of the agreement around in such a manner to make the employee [fol. 266] believe that he will receive a lesser weekly income.

Q. What did he say?

A. Well, he says, "No, we didn't indicate to them whether they should or should not in any manner. We left it up to them."

Q. What did he say, if anything, about having expressed his personal views about the union to them?

A. That was after questioning by Spud.

Q. Tell me what Spud said.

A. He said, "In your talking to the employees about this did you express some of your own personal views?" And as I remember, his answer was, "Yes, everybody around here knows my standing, that I want no union and, truthfully speaking, I don't want any union". It came to the point he said, "I would be willing to sacrifice a thousand dollars a year if it meant belonging to a union, provided I didn't have to have any part of it, however, ten thousand might change my mind".

Q. Did anybody make any remark to that?

A. I said first that, well, "I think that answers it. I think that answers the change in the attitude of the employees", and Spud said, "Are you giving us a goal to shoot at?"

Q. What took place then?

A. There was conversation about we still wanted to conduct this meeting and so on, that we still strongly [fol. 267] believed it would be to the advantage of both the employee and the employer were this to come about whereby they would be unionized.

Q. By the way, did Bill Garmon ever say, "Come on out. I am going to tell all the men it is all right for them to join the union"?

A. No.

Q. Did Max say that, or anything like that?

A. No.

Q. Did you ever tell Bill Garmon or any other of the Garmons to sign that contract before the men were members of the union?

A. No, sir.

Q. Now Mr. Garmon has told us that on August 16th, 1952, all of the men who are now with him were given a raise. When was this meeting at the hotel that you say you explained?

A. That was August 14th. The one at the Oceanside hotel, you mean?

Q. Yes.

A. August 14th.

Q. Two days before. Then he tells us that on March 28th all of the men who are now with him got a raise. You say you had met two days before, is that when you had met with him?

A. That is when I met with the employees.

Q. At the time you presented this contract to him and [fol. 268] I take it this is Plaintiffs' Exhibit 1. Do you know if this is a copy of the contract that you left with him at that time?

A. This is a copy of the contract that I left with him at that time.

Q. And at that time—when you later—it was on March 26, did he disclose to you he wasn't paying as much money as the contract called for and when he asked "Where am I going to get the extra money?"

A. He asked that when I mentioned the $1.75 average.

Q. Since the pickets have been on have you at any time gone to Bill Garmon or his brother, Stewart, or to Max Garmon and told them they must sign this contract before the employees sign it?

A. I have talked to no Garmons since the meeting where Max informed me the employees voted "no union".

Q. Did the Building Trades Council, have they placed any members of the unions that belong to the San Diego Building Trades Council on picket in the lumber yard?

A. The Building Trades Council has placed nobody on a picket.

Q. That is, none of your men have been placed on the picket line at all?

A. No. None has from the Building Trades Council.

Q. Have you paid for any pickets on the picket line?

A. No.

[fol. 269] Q. A Mr. Hughes was on the witness stand—By the way, Mr. Hughes, who is manager of the Escondido Lumber Company, states you had several conversations with him. Let's take the first one. He states that you called him on the phone and stated that you couldn't do anything with the Valley Lumber Company and were going to get tough with them. Did you have that conversation with him?

A. That wasn't my first conversation with him.

Q. What was your first one?

A. It was the usual approach, a copy of the agreement and weigh out the feeling and the size of the yard and the number of employees and things like that, and at that conversation he informed me that Mr. Geib would have to take care of all that part, that he was merely the manager, himself.

Q. How did you have a conversation with him?

A. Earlier on the telephone we had discussed—as a matter of fact, I had heard around the area and I had told around there that the Valley Lumber Company appeared to be going union, especially since talking to the employees, and that I had told him that and I said that right during this time the reason for the delay is that Mr. Garmon wanted to meet with Mr. Geib and he had very little to say as far as that was concerned, but he did ask we keep him informed on it, so after everything broke down and we received that direct answer of all of the employees "no union," I, after I [fol. 270] came back to San Diego, I remembered my promise to him and I called him and told him that there seemed to have been a reversal of the employees over there so now we had to figure out some other steps to take.

Q. Did you tell him you were going to get tough? Did you use that word?

A. I make it a point never to use those kind of words in this particular mode of operation.

Q. Did Bill Garmon tell you you had always been gentlemanly and fair with him?

A. He had said that.

Q. Did you tell Mr. Hughes what sort of thing you felt you would have to do to accomplish the purpose of organizing the yard?

A. I don't think it came to that. It was a very short conversation, just to tell him that there had been a reversal and we would have to figure out the next step.

The Court: May I interrupt? What was your purpose in calling Mr. Hughes on the Valley Lumber Company business?

A. He had asked me to keep him informed.

The Court: Did you organize the Escondido Lumber Company?

A. No, but I was carrying on routine contacts there just like I was at the Valley Lumber Company.

The Court: You were telling him about your negotiations with the Valley?

[fol. 271] A. Uh-huh.

The Court: It really was none of his business, was it?

A. No, but not necessarily it wasn't, but I felt there was no harm in telling him. I tried to elevate any time we completed negotiations with the yard that maybe that might cause them to follow suit. I was very interested in keeping him informed, especially since all the reports indicated progress was being made in regard to Valley there.

By Mr. Holt:

Q. If I understood your statement, which the Court maybe did not, he being distracted when the Clerk handed him something, you had stated that you had told the old gentleman it looked like the Valley was going union, the men had indicated to you they were going union?

A. That is correct.

Q. And he told you to keep him informed?

A. That is right.

Q. After telling him you thought they were going union you remembered your promise and called him up and told him the thing had broken down?

A. That is right.

Q. Now he says on May 4 of 1953, if I followed his testimony correctly, he made a statement that you told him if he didn't refuse to take the Valley Company's deliveries that you would put pickets on him?

A. I didn't say that.

[fol. 272] Q. Did you have any conversation like that with him?

A. No, but as I remember the conversation that day, I asked him if he had heard from Mr. Geib recently. He explained Mr. Geib came down at long spaces of time. I said, "Have you received instructions from him in regard to handling lumber at your yard for the Valley Lumber Company?" He said, no, he had received no specific instructions about that. I said, "Well, I wanted to make it clear as to whether or not Mr. Geib had given you any instructions. That is why I came in here, because we have been, I think, getting along here pretty friendly".

Q. Did you have any other conversation with him at that time?

A. That is all I can recall. Mr. Taylor was with me then.

Q. By the way, at the time this picketing took place, did you place the Valley Lumber Company on what is known as the "unfair list", that is, sending out a list to different people stating that certain people were unfair to organized labor?

A. I did not.

Q. When you told Bill Garmon that you wouldn't permit him to sign the contract before you represented the employees—Did you tell him that?

A. Well, absolutely.

Q. And when you told him that, that is what you had [fol. 273] done at the St. Malo and the other yards, was that the truth?

A. It was.

Mr. Holt: You may cross-examine.

Cross-examination.

By Mr. Archer:

Q. Did you tell Mr. Garmon in this conversation about the St. Malo that you had picketed that yard for nine months before you got anybody to sign anything?

A. I don't remember whether I told him it was being picketed, but I assume he knew it since he was associated with the St. Malo Lumber Company.

Q. That is a fact, is it not, before you signed anybody at St. Malo, you had picketed that yard for nine months?

Mr. Holt: I am going to object because it is incompetent, irrelevant and immaterial and obviously legal or they would have been stopped.

The Court: He said he told them about all his organizational work for these other yards and he may inquire about it.

By Mr. Archer:

Q. Did you tell them that, in these conversations that you have related at great length about what you told Mr. Garmon and how you only sign up the employees first and never present a contract, did you tell him that you had [fol. 274] picketed St. Malo for nine months before you signed up anybody?

A. I don't know whether I told him that, but that is the fact, there was pickets there for approximately nine months and he was a member of the association which St. Malo was part of and I assume he knew that. If I didn't tell him, there was no harm in telling him that I could see.

Q. It was out of that situation that the association—I should say it was out of that situation at St. Malo that the Association filed the unfair labor charges which were referred to in the minutes which we previously read?

Mr. Holt: I think I will object to that as immaterial.

The Court: I will sustain the objection.

By Mr. Archer:

Q. Did you discuss with Mr. Garmon the fact that the N.L.R.B. had refused to entertain any unfair labor charges in the St. Malo case?

A. I don't think we talked about the National Labor Relations Board or unfair labor charges.

Q. Do you have in your possession a transcript of the conversation which you have related from the witness stand?

A. I have in my possession an outline; it isn't word for word as I have related it here.

Q. May I see that?

Mr. Holt: I think I will object to it. He is not referring to it to refresh his recollection.

[fol. 275] The Court: I will sustain the objection.

Mr. Holt: People who always do wrong suspect others of doing so, I note.

Mr. Archer: That is why I have to watch you so closely.

The Court: Nothing like trying, Mr. Holt. No harm in trying.

Mr. Archer: He just didn't want to repeat the mistake he made in the Benton case.

Mr. Holt: I wasn't in that.

Mr. Archer: You have undoubtedly been informed.

The Court: Let's proceed.

Mr. Holt: A man as untruthful as you should keep his mouth shut.

Mr. Archer: Let's not get personal.

Mr. Holt: You did it to me two or three times.

Mr. Archer: I can match you with insults any day, Counsel.

The Court: Let's proceed.

Mr. Archer: And out do you.

Q. Mr. Holt asked you whether or not any of the Garmons said, "Go out and talk to the men" and you said no, that they never invited you. Isn't it a fact that Max Garmon told you that you could go out alone on the men's time and on his time and talk to the men and if they would sign up that the partners would sign?

A. Just like that, no, but it was indicated that [fol. 276] management had no objection to my talking to the employees.

Q. And you did go out with their permission and talk to the men, without management being present at all, isn't that right?

A. I did at that time, yes, as I earlier related.

Q. You said that the Building Trades Council are not supplying the pickets. Who is supplying the pickets?

Mr. Whelan: Object to that on the grounds it calls for a conclusion and no proper foundation.

The Court: If he knows he may answer.

A. The picket is being supplied by wherever they can hire them. I understand he is a hired picket.

By Mr. Archer:

Q. Do you know who hires him?

A. The Millmen and Teamsters' Unions.

Q. Do you know what his name is?

A. I do not.

Q. Prosser, is that the name?

A. I wouldn't know it if I heard it.

Q. Who is paying for the picket?

A. I am not sure there but I believe the Millmen and Teamsters Unions.

Q. In the minutes that we read a few moments ago there was reference to the Executive Committee had authorized the expenses of this educational program?

A. It was necessary that I have a number of meetings [fol. 277] with employers and individuals in regard to this place, and most of them were in the Carlsbad-Oceanside area and I did incur expenses. I believe one time there was the renting of a room at the Hotel Carlsbad and another time I believe there was a dinner for a group of them prior to their meeting at the hotel, and so on.

Q. How are these minutes prepared, do you dictate them to the secretary?

A. No, I write them at the time they go on record in the meeting of the delegates only.

Q. You write them out and give them to her and she types them into the record?

A. Yes.

Q. She, of course, records what you have written out?

A. What I have written out and what I have transferred over to Mr. DeBrunner when I have to leave, and they are given to her by dictation or by notes. Sometimes Mr. DeBrunner handles that part of it and sometimes I do.

Q. She doesn't make them up of her own——

A. Oh, no.

Q. —mind. Now, you said in response to a question by Mr. Holt that you never use such words as "get tough with him". Was it your Secretary's words when she wrote in there that you would have an "all out war" if they didn't sign up?

A. That was not reported by me.

Q. Who was that reported by?

[fol. 278] A. It said business manager. That would be Walter DeBrunner.

Q. He is a member of the Executive Council?

A. He is.

Q. Now you say that you never put the Valley Lumber Company on the unfair list, is that right?

A. Not to my recollection.

Q. The Central Trade and Labor Council did, however, send letters out to all the contractors, did they not?

Mr. Holt: I am going to object as incompetent, irrelevant, and immaterial, not binding on our client.

The Court: Overruled.

Mr. Holt: Not the best evidence.

The Court: You may answer.

A. The Central Labor Council——

By Mr. Archer:

Q. No, I mean the Building Trades Council sent out a letter to all contractors?

A. With reference to the Valley Lumber Company, no.

Q. With reference to all the unorganized lumber yards?

A. No.

Mr. Archer: May I have the minute book again, please, Mr. Todd?

Q. I will show you again the record of the Executive Board of the Building Trades Council for September 18, 1951, and I will call your attention to the fact that a motion [fol. 279] was made, seconded and carried, concurring in the Business Manager's request for permission to circularize the contractors in the northern part of the County in an effort to organize the lumber yards. Is that what it says there?

Mr. Holt: Object to that as not any impeachment at all.

Mr. Todd: Volume and page, please.

The Court: I will overrule the objection.

Mr. Archer: I read from Plaintiff's Exhibit 4 for identification at page 463, the minutes of September 18th, and my question is, is that not what is recorded therein?

A. On September 18, 1951, that is recorded therein.

By Mr. Archer:

Q. Yes. So letters did go out to the contractors, did they not?

A. Letters went to the contractors, but not listing non-union yards. That was your earlier question. The letters that went to the contractors listed the fair yards. They were advertising the union yards.

Mr. Archer: May I have that read, please?

(The record read by the reporter.)

By Mr. Archer:

Q. And that is what is meant in here when they were being circularized in an effort to organize the lumber yards?

A. Yes, sir.

Q. You notified the contractors who were fair; you [fol. 280] didn't make any reference to who might be deemed by you to be unfair?

A. That is true, sir.

Q. During the course of this picketing have you been familiar with the activities that have been conducted at and around the Valley Lumber Company?

Mr. Holt: That is objected to as based upon hearsay, no showing he was ever up there.

Mr. Archer: That is what I am asking him.

Mr. Holt: Not proper cross-examination. It opens up a brand new field.

The Court: Let him ask the question. He hasn't finished it.

Mr. Holt: I am sorry.

The Court: I don't know what he is going to ask.

Mr. Archer: Would you read it as far as I was able to get?

(The record read by the reporter.)

By Mr. Archer:

Q. During this period of time in question?

Mr. Holt: Same objection.
The Court: Overruled.

A. It has been reported to me about the——

Mr. Holt: Just a minute. I object to any hearsay as it was reported to him.
The Court: He may report any knowledge he had of it.
[fol. 281] You may answer the question.

A. I received reports that they were throwing oranges at our pickets and that they were throwing marbles at the pickets, that they were attacking him with a car, and all those things naturally we discussed among ourselves, yes.
Q. Have you had any reports about the following of the company's trucks?
A. I have heard those also.
Q. Who reported that to you?

Mr. Holt: That is objected to as hearsay.
The Court: Overruled.
Mr. Holt: It is not proper cross-examination.
The Court: Overruled.

A. I have received reports on the—mainly the reports, I received, Mr. Archer, has been on the abuse the picketing was getting.

By Mr. Archer:

Q. You don't get any reports on the abuse the management is getting?

Mr. Holt: Object to that as argumentative and not based on the evidence.
The Court: I don't think he has answered the question at all. If he will read the question back you will find the answer he gave was not an answer at all.

(The record read by the reporter.)

[fol. 282] A. The part on the following of the cars?

By Mr. Archer:

Q. Yes.

A. I couldn't say specifically.

Q. You don't have any recollection of anyone?

A. It may have been any one of those gentlemen sitting back there.

Q. In any event, someone or more of those gentlemen back there have reported to you that they are following the Valley Lumber Company trucks in their cars?

Mr. Holt: Just a minute. I am going to object to that as hearsay.

The Court: Overruled.

Mr. Holt: Improper cross-examination.

The Court: Overruled.

Mr. Holt: May I have a continuing objection on these grounds so we don't have to waste your Honor's time?

The Court: You may.

A. Did you say some one or more of those gentlemen have reported to me that they have been following cars?

By Mr. Archer:

Q. Yes. No, following the company's trucks in their cars?

A. No.

Q. None of them have?

A. Not that they have been following cars. They have [fol. 283] reported that some trucks had been followed.

Q. By whom?

A. I say no one specifically. It was one of those people that had been putting their time in up at the yard.

Q. Some one of these men that are here in the courtroom have reported to you that someone is following the trucks up there, is that right?

A. Yes.

Q. And they have not ever bothered to identify who it is that is following them?

A. All this came about as we were discussing this business over.

Q. All right. That is fine. Naturally you would be talking this over to get that information.

A. I mean whenever we found out we were going to court and wanted our case right, we talked over this and this was reported to me.

Q. What do you mean by "you wanted your case right"?

A. We talk over among ourselves the different things that have developed in order to get some semblance of the time everything was supposed to have happened.

Q. You have all gotten together and talked this over before coming to court?

A. Yes, that is right.

Q. To get your case right?

A. That is right.

[fol. 284] Q. And some of those men in the courtroom reported to you that the company's trucks were being followed?

A. They did.

Q. Who did they say was following the trucks?

A. Specifically who was following the trucks I don't know.

Q. Prior to getting together to get the case right did you have any knowledge they were following the trucks?

A. Not that I can recall.

Q. Did you have any knowledge that any of these men working for or with you or members of your affiliated associates were calling upon contractors in that area?

Mr. Holt: That is objected to as not proper cross-examination.

The Court: Overruled.

A. Calling on contractors in the area is going on constantly.

By Mr. Archer:

Q. Not referring, of course, to this situation?

A. No, routine. The routine work of a Business Agent is calling on the people he represents.

Q. Have you had any report from any of the union representatives that they have called on contractors to inform them that there are pickets at the Valley Lumber Company?

Mr. Holt: Object to that as hearsay.

[fol. 285] The Court: Overruled.

A. I have heard that, yes.

By Mr. Archer:

Q. They have been doing that?

A. Whenever the question arises about the Valley Lumber Company, many of the contractors—it is a topic of information. They will say, "What is going on at the Valley Lumber Company"? Then the agents say that the Valley Lumber Company is being picketed. That has happened in my own case.

The Court: We will adjourn until tomorrow morning at ten o'clock. I mean Thursday morning at ten o'clock. I want to remind you again that Thursday is the last day I can hear this thing and you are going to have to finish it.

Mr. Holt: If you will give us a minute we can tell you about how long it will take.

The Court: The estimate was one day and we have been at it two days.

Mr. Holt: Not I.

Mr. Archer: I am sure I didn't give the estimate.

Mr. Whelan: Every case that is set is put down for one day.

(Court was adjourned at 5:03 P. M.)

[fol. 286]

San Diego, California, Thursday, June 4, 1953, 10:00 A. M.

The Court: Garmon against Building Trades. You may proceed.

Mr. Archer: Mr. Collins, will you resume the stand, please?

MORRIS COLLINS, recalled as a witness for and in behalf of the defendants, and having been previously duly sworn, resumes the stand and testifies further as follows:

Further cross-examination.

By Mr. Archer:

Q. Mr. Collins, I believe that you testified that you did not and would not request or demand that the employers

sign a contract until the men had accepted your invitation to join the unions involved, is that correct?

A. That is correct.

Q. Will you please explain to us what the following of the Valley Lumber Company trucks has to do with inviting the men to join the union?

Mr. Holt: I object to that as based upon something not in evidence. There is no evidence he had anything to do with it or knew anything about it until the other day in court, or when the case was being prepared several days, and he was told about it. Calling for a conclusion of the [fol. 287] witness. Something he had nothing to do with. The men will be called to the witness stand, of course, but I think this is argumentative and calling for a conclusion, based upon hearsay.

The Court: Mr. Holt, as I understand it from the minutes here, these strikes are authorized by the Council, aren't they?

Mr. Holt: That is right.

The Court: And he is the Secretary of the Council. I think if the strike, or the pickets are put up there on authority of the Council I don't think they can authorize the putting up of pickets and then completely forget about it and say that whatever happens thereafter they don't know anything about.

Mr. Holt: May I clarify the record. I think the evidence shows that the Council did not authorize the placing of these particular pickets, nor did they hire them. I want to make our position very clear. If the Carpenters had not placed pickets on the Valley Lumber Company—It is necessary that the issues be clarified here so a proper ruling can be made—If the Carpenters had not gone ahead, and they are not a member of our Council at all, and I want to make this statement to you in all honesty so you can make a clearcut decision—If the Carpenters had not gone ahead and put pickets on this witness would have advised the Council and I would have advised the Council to picket the [fol. 288] Valley Lumber Company, the employees thereof, to try to get them as members of the union. I think that will clarify the issue so that there will be no question in your Honor's mind when you finally make a decision, that it is

our desire and our wish and our intention to picket the employees of the Valley Lumber Company if permitted by law to do so. I think that should be clarified at this moment, but relative to the following of the trucks, it was the Carpenters who are not members of the Building Trades Council who did put the pickets out and the pickets were, obviously, from what he says, under the direction of the Carpenters, therefore it is calling for a conclusion.

The Court: Let me say this: I think Mr. Collins testified he called the man at the Escondido Lumber Company about putting out this picket, and so forth, or at least kept him advised. If the Council had nothing to do with it, what was their interest in that?

Mr. Holt: They would naturally be interested, without giving direct orders, and let me say my clients approve of the picketing. Mr. Collins knew they were there, of course, but they were not under our direction, is my point. Of course we are interested and of course we approve of the picketing. I want to make it very clear so there is no misunderstanding as to our position.

The Court: I think your objection to Mr. Archer's question in its present form is probably well taken. He [fol. 289] may inquire as to what he knows about the following of the trucks.

Mr. Holt: Surely.

The Court: I will sustain the objection as it is not put—I mean the question as it is now put.

Mr. Holt: If he puts that question there will be no objection, of course. It is entirely proper.

By Mr. Archer:

Q. According to my notes, Mr. Collins, you have testified late Tuesday afternoon that the Building Trades Council didn't provide the pickets, is that right?

A. That is right.

Q. And that you did not pay for them?

A. That is right, yes, sir.

Q. And on cross-examination I asked you who provided them and you said the Millmen and the Truck Drivers?

A. And the Teamsters.

Q. And the Teamsters?

A. That is what I was told.

Q. And presumably they are paying for them?

Mr. Holt: They are part of the Carpenters, aren't they?

Mr. Whelan: The Millmen are affiliated with the District Council of Carpenters and with the International Brotherhood of Carpenters and Joiners.

By Mr. Archer:

Q. And the Truck Drivers are affiliated with whom?

[fol. 290] A. With the Building Trades Council.

Q. So that a unit of your Building Trades Council did put the pickets on the Valley Lumber Company?

A. If you say that the Teamsters placed the pickets, or had a part in placing them, yes, they are a unit of our Council.

Q. Yes. That is what I thought. It is my recollection that you testified that you had reports that these delivery trucks were being followed is that right?

A. That is true.

Q. Will you explain to us what the following of these trucks has to do with inviting men to join a union.

Mr. Whelan: That is objected to as based upon hearsay.

The Court: Overruled.

A. Well, I have followed trucks in my day and when I do there are two reasons——

Mr. Holt: Just a minute. I am going to ask that be stricken as not responsive to the question.

The Court: That was just preliminary. He will tell us now what that has to do with picketing. You may answer.

A. If we have pickets on a line in an organizational case, as this is, I follow trucks for two reasons; one, to find out where the material is going and, two, if they go to a place where it is within what you might say my jurisdiction to go upon that job I many times get a chance to talk to the driver of the truck and have, in many cases, been able to [fol. 291] answer questions he had about all this, and so on. In other words, I go there with the purpose of creating a discussion about our picket line and our unions and what good they are, and so forth.

Mr. Holt: I ask that be stricken because it is not comparable to any situation relative to the evidence. There is no evidence that took place in this case at all. What he has done in some other case dissimilar to the evidence in this case is entirely immaterial.

The Court: I don't think he has answered, but I will let the answer stand.

By Mr. Archer:

Q. You, as I understand, follow the practice—is that the general practice of the affiliates of the Building Trades Council?

Mr. Holt: I am going to object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

By Mr. Archer:

Q. What you have just described——

A. I wouldn't say it was a practice, no. We have had picket lines where no trucks were followed.

Q. But that is the general pattern of why you do it when you do follow the trucks?

A. Yes.

Mr. Holt: May I have a running objection to this line [fol. 292] of testimony.

The Court: Yes.

A. That is my own personal reasons, is to create conversation and maybe somebody will ask me on the job where the material came from. They might ask me "Is that place being picketed?", or maybe I will have the opportunity to tell them the place is being picketed.

By Mr. Archer:

Q. What does that technique have to do with inviting men to join the union?

A. The opportunity to get to talk to the driver, which I mentioned. They are the ones we are trying to get in our union.

Q. It has no bearing on inviting anyone else, however?

A. The drivers or people working for the firm are the ones we are interested in becoming members of the union.

Q. Will you explain to us what the stopping of deliveries has to do with inviting any of the employees to join a union?

A. As far as I know we never stopped deliveries.

Q. You don't mean to tell us that having the picket line out in front of an establishment doesn't stop the deliveries?

Mr. Holt: That is objected to as calling for a conclusion and argumentative.

The Court: Overruled.

[fol. 293] A. It may be that a member of a union that is approaching that particular point will refuse to cross the picket line of his own volition.

By Mr. Archer:

Q. Does that have anything to do with inviting the men working behind the picket line to join the union?

A. You mean because this individual refused to cross a picket line?

Q. Yes.

A. I don't know what that would have to do about the man behind the line that you want to get as a member of the union.

Q. That doesn't extend any invitation to the man behind the line?

A. We have a standing invitation for the man behind the line to join the union.

Q. That particular activity doesn't renew or extend the invitation?

A. I don't understand whenever a man, himself, refuses to cross a line of the—you mean by that particular activity? We have union people that cross picket lines.

Q. Will you explain to us, if you can, what circularizing the contractors as to what companies are on the so-called fair list has to do with inviting men to join your union?

Mr. Holt: I am going to object to that as incompetent, [fol. 294] irrelevant and immaterial for the reason that there is no showing there was any such circularization after the injunctions were issued in this case.

The Court: I think there has been some testimony to that effect. I will overrule the objection.

A. There has been no circularizing of contractors in the northern county since the approach was first made at the Valley Lumber Company.

The Court: Don't give us the answer of Mr. Holt. Answer Mr. Archer's question.

By Mr. Archer:

Q. My question is very simple, Mr. Collins. I asked you what that had to do with inviting men to join the unions?

A. It is our policy wherever we can to advertise unions. It is our policy to advertise membership in those unions. It is our duty to do whatever we can to create more employment for the people that are members of the union. Whenever the opportunity presents itself it is our duty to let people know this particular group is operating union, is operating 100% union, or that this particular group is going to go union.

Q. That still doesn't answer my question as to what, if anything, does that circularization of the contractors have to do with inviting persons to join the union?

A. It would be very indirect. Maybe—it would be a [fol. 295] very indirect means. I will admit that, but in the circularizing of the contractors, or the advertising of these union contractors, which is still indirect to advertise our union employees, we are advertising the union and maybe by advertising the union and selling union, maybe those employees will be more inclined to join us.

Q. Do you think that the contractors that received your letter indicating who was on the fair and unfair list, or, rather, who was on the fair list, passed that along to the employees of the Valley Lumber Company?

Mr. Holt: I am going to object to that as a duplicitious question calling for a conclusion of the witness. What does he know of what somebody would do out of his presence?

The Court: He was doing the various things he was inquiring about and Mr. Archer wants to know why he did it.

Mr. Holt: His question was "Do you think that the contractors passed that on to somebody else?"

Mr. Archer: I will reframe the question.

Q. Was it your intention that the contractors that received your communication indicating who was on the fair list would call upon the employees of the Valley Lumber Company and invite them to join the union?

A. Yes, sir.

Q. That was your intention, was it?

A. Yes, sir.

Q. Do you know of any contractor that did that?

[fol. 296] A. I do, sir.

Q. Who?

A. The one that built the Penny Store in Escondido.

Q. What is his name?

A. There are two names. The Superintendent's name was Noble.

Q. And he called upon the employees of the Valley Lumber Company and invited them to join your union?

A. He remarked to the employees as they made deliveries to his place, so I am told, that he thought it would be wise for them to join the union, that it would be better for the company and for them if they did.

Q. When did that take place?

A. During the construction of the store. When or what day I wouldn't know.

Q. What is the man's name?

A. Noble.

Q. Is he a member of either of these unions?

A. I don't know.

Q. Did he tell you that?

A. He told me that.

Q. Did he tell you why he told the men that?

A. Yes. At the very beginning of the job he called me at his office before he had started and he asked me where he should do his business with the lumber, that he wanted to do it with a union firm. I told him there was none in [fol. 297] Escondido but as far as I could determine the best yard at Escondido was the Valley Lumber Company, so he did his business with the Valley Lumber Company in spite of the fact they were not union, and then he told me later on, as I have said, I visited the job when the drivers came in and he had suggested to them it would be for everybody's benefit if they were to go union.

Q. During this time of the picketing of the Valley Lumber Company were you visiting the Penny job?

A. I think the Penny job was complete then.

Q. Then there would be no reason for this Mr. Noble being interested——

A. This inviting of the employees has been going on a long time before the pickets were out.

Q. As I understood your testimony, March 26th was the first and only time—March 26th, 1953, you met with, or representatives of your unions, met with the employees of the Valley Lumber Company and invited them to join, isn't that correct?

A. No. That was the first time we had had a group meeting with them.

Q. Yes.

A. That is the first time we had a formal, group meeting.

Q. When did you first meet with any of them?

A. I think some of the other agents had met with them [fol. 298] on and off and talked to them on various jobs over a period of years.

Q. The first time you talked to them as a group and offered the formal invitation to them was March 26th, is that right?

A. The first time I did, yes.

Q. Why, then had you voted to picket the companies more than a year before the invitation was extended?

A. We hadn't voted to picket the companies more than a year before it was extended.

Q. I will direct your attention again to your Executive Board meeting minutes of February 5, 1952, wherein it is recorded as follows: "By separate motion, seconded and carried, the following recommendations were made for the Council's consideration", item number 6 being: "To approve placing of pickets on non-union lumber yards, in San Diego County." Is that not what is recorded there?

A. That is what is recorded.

Q. And directing your attention to the San Diego County Building Trades Council minutes of February 5, 1952, is it not there reported as follows: "The Business Manager's report—reported that the organizing campaign in the lumber yards in the northern part of the county had gotten to

the point where pickets seemed necessary, and although the representative of the yards promised to invoke an injunction the minute we established a picket line we will probably have [fol. 299] pickets on some of these yards shortly". Is that therein recorded?

A. It is.

Q. So that for more than a year prior to the time you extended the men in this case the invitation to join, you had voted to picket the non-union lumber yards in the northern part of the County?

Mr. Holt: I am going to object to that as based on something not in evidence. He said they had been talking with these men and inviting them for years, unless he is referring to the formal meeting.

The Court: Overruled.

A. Would you restate your question, Mr. Archer?

By Mr. Archer:

Q. So that it is a fact from your records that for more than a year prior to your meeting of March 26th with the employees of the Valley Lumber Company you had voted to picket non-union lumber yards in the north San Diego County?

A. We hadn't voted to picket them. We had been granted authorization to picket when necessary.

The Court: Do you get another authorization to picket after this or is that sufficient to put a picket on if you see fit to do so?

A. Once the authorization is made if the conditions present themselves as such whereby it appears a picket would be necessary, then we have the authorization to place [fol. 300] them at that time.

The Court: It is up to the officers of the union or the Council, isn't that right?

A. Yes, your Honor.

By Mr. Archer:

Q. Directing your attention to this sign, Defendants' Exhibit A, reading "Millman's Union, No. 2020, Teamsters' Union, No. 36, invites employees to join". Have you ever

used, or have any of your affiliated unions ever used an invitational sign like that prior to this case here?

A. Do you mean that prior to this time did we have the words "invites"?

Q. Yes.

A. Not that I can recall.

Q. This is something entirely new and different?

A. Each sign is probably a little different, but this one is the first time I can recall we have used the word "invites".

Q. So this is the first time you had the invitational picket line, is that right?

A. I don't know whether you would call it an invitational line. I would call it an organizational picket line.

Q. That is what I thought, but Mr. Holt used "invitational" so I thought you were probably using that.

A. It makes no difference as far as I can see. It means the same thing.

[fol. 301] Mr. Archer: That is all.

Mr. Holt: No further quetsions. You may step down.

The Court: You may step down.

Mr. Whelan: Mr. Taylor.

CHARLES O'BRIEN TAYLOR called as a witness for and in behalf of the defendants, and having been previously duly sworn, resumes the stand and testifies as follows:

The Court: You have been previously sworn.

Direct examination.

By Mr. Whelan:

Q. You are the same Charles O'Brien Taylor that has previously been sworn and testified here?

A. Yes, sir.

Q. And I believe that you testified that you were an official of the Millmen's Union, Local No. 2020?

A. That is correct.

Q. And you have testified that that Local Union is affiliated with the District Council of Carpenters, but not affili-

ated with the San Diego Building and Construction Trades Council?

A. That is correct.

Q. Are you personally acquainted with Mr. William A. Garmon, who has been referred to here mostly as Bill Garmon?

[fol. 302] A. I am.

Q. Are you likewise acquainted with Mr. J. S. Garmon, who has been referred to here by Mr. Rutledge as Spencer?

Mr. Archer: That is Stewart.

Mr. Whelan: Is it Stewart? Yes.

A. Yes.

By Mr. Whelan:

Q. Are you also acquainted with Mr. J. M. Garmon, who has been referred to here quite frequently as Max Garmon?

A. Yes, sir.

Q. Directing your attention to a date on or about February 1, 1953, I will ask you if you went out to the lumber yard of the Valley Lumber Company?

A. Yes.

Q. And were you accompanied by anyone or did you meet anyone there?

A. I went to Escondido with Mr. Collins.

Q. And after you arrived at the yard of the Valley Lumber Company did you talk with anyone?

A. Upon arriving at the yard we went in, Morrie, or Mr. Collins, and he started introducing me to Bill. I told him I had known him for some time and Bill asked us to come in his office to have a talk.

Q. Will you state what took place in that discussion?

A. We went in and sat down and I think Max was there part of the time, I wouldn't say, and we discussed the——

[fol. 303] Well, our thinking of why it would be good to be union. Morrie asked him about the going over the contract. He says, "Is this the same contract you left with me before?" Morrie said it was. After talking at some length our conversations had been on many things besides the organization. Discussion was brought up as to the signing of the contract. It was explained to him the procedure used in signing the other contracts, that we would not allow any

employer to sign a contract until it became union, that we had a set procedure which we followed on that and when the employees were union that we would sign the employers, with all representatives of the union present, and the contracts would be signed in triplicate and everyone given a copy at the time.

Q. It was then specifically stated to him that no contract would be signed with the employer until the employees became members of the union?

A. That is correct.

Q. And you say it was explained to him that there would be—after that end was accomplished there would be a joint meeting with the representatives of each union affected with the employer?

A. That is correct.

Q. After that conversation terminated, was there anything stated about a further interview?

A. It was talked at the time that we should have further meetings and Bill at that time said he wanted more [fol. 304] time to study the contract, that he had other things to do, and he wanted to see about the employees. We encouraged him to tell us if he would be willing, if the employees were willing to sign, and he said, well, we should have a future meeting and see about that.

Q. Now directing your attention to Thursday, March 26, 1953, I will ask you if you again went to the place of business of the Valley Lumber Yard in Escondido?

A. I did.

Q. And who accompanied you on that occasion?

A. Al Packard.

Q. And when you arrived there did you see anyone there that you knew?

A. Yes. Mr. Bob Aust was there and Mr. Collins.

Q. Before seeing Mr. Aust and Mr. Collins, did you make any inquiry of any officer or employee of the Valley Lumber Company?

A. Yes. We had been in the Oceanside district and Vista district and on the way home through Escondido stopped at Van's Lumber Company and I said to Al, "Let's drive by Valley and see if any of the boys are there". I saw Mr. Collins' car and I went into the store part of the building. I said, "Is Collins here?" And they said, "Yes". And I can't

remember who it was, but they said he is out back of the shed talking with the boys. I immediately went back to the yard where they were talking.

[fol. 305] Q. And when you did—withdraw that. You say you stopped at Van's Lumber Yard near Escondido. Will you state whether or not your union has a contract with Van's Lumber Yard?

A. It does. It has a contract and the employees are members.

Q. The employees of Van's Lumber Yard are members of your union and the Teamsters, Local No. 36?

A. That is correct.

Q. Is that operated by a man by the name of W. H. Vandergriff?

A. That is right.

Q. How far would you say Van's Lumber Yard is from the Valley Lumber Company yard?

A. Oh, I would say a mile and a half.

Q. Did you have a contract in existence with Van's Lumber Yard on Thursday, March 26, the day you stopped by there?

A. Yes.

Q. When you went by the building of the Valley Lumber Company, you say you saw Mr. Collins and Mr. Aust there on that same Thursday, March 26th?

A. That is right.

Q. What was going on when you arrived?

A. When I arrived the majority of the men were seated on a low lumber pile—I believe there was one [fol. 306] standing, and Mr. Collins was talking to them about the union contract which we hoped to have them become parties to, or members, so they could be under the contract, and he had been there, as it appeared, some little time before my arrival. As I came up, he said, "Here is Spud Taylor. Some of the questions I couldn't answer about the Millmen's Union he can probably answer, if you have additional questions." He had a contract in his hand. The only question directed at myself was that they seemed to be under the understanding if one of them joined the Millmen's Union his hands would be tied from operating a truck, and I assured them all the small yards in the county, that that was not the practice and their work was inter-

changeable, and I think that was the only question. Then after some more discussion with Mr. Collins, he asked each one of them if they would be willing to go along if management would also go along and they signified, with some reservations, that they would. Then we walked to the end of the building——

Q. Just a minute. You said that they each signified, with some reservations, that they would be willing to become members. Can you recall any reservations made?

A. The only one—one man said, "I don't see where I would gain a great deal because I have to pay you and it just about takes up the amount I would receive from the company."

Q. He said that any increase in wages under the [fol. 307] contract would be used to pay the union dues?

A. That is correct.

Q. Was any explanation given to him at that time by Mr. Collins?

A. I made a short explanation that this, even though he might not gain in monies at that time, that he would at least have a guarantee that that would continue and we did have negotiations coming up in August where there would probably be additional monies.

Q. What, if anything, did that man reply to that?

A. He said, "Well, if the rest of the boys goes, I will go along with them, too. I have no objection."

Q. Then you started to say something about being called off to the end of the building.

A. We walked to the end of the building and Morrie said to Jack, the foreman, he says, "Probably Spud can tell you about the foreman's pay in the other yards that he has".

Q. You then had a conversation with Jack?

A. I did and I told him that we don't have it specified in our lumber yard agreement, although in a lumber yard the practice was in those that I represent that they usually paid the foreman a dollar a day over the highest paid journeyman. In the mill and cabinet and fixture shops the practice of 25¢ or two dollars a day for the foreman in those places.

Q. Did Jack Rutledge make any statement to you after [fol. 308] that explanation was made to him?

A. Not to me.

Q. Did he say anything to Mr. Collins in your presence about that pay matter being included in the contract?

A. He said definitely that he didn't think—he definitely wanted it in the contract if he was going to go along. Mr. Collins told him at that time in my presence that he would have to go into the office and talk to them as to whether he could get that in the contract.

Q. He, Collins, would have to go talk to Mr. Garmon, is that correct?

A. That is correct.

Q. Now did you, yourself, go in and talk to Mr. Bill Garmon after this conversation that occurred in your presence on March 26th?

A. No. We walked to the further corner of the building and I said to Collins, "I have got a meeting in town and I have got to take out." Packard and myself got in the car and returned to San Diego.

Q. Did you see Mr. Collins and Mr. Aust proceeding towards the office as you left?

A. I couldn't be sure. They were still on the premises.

Q. Now directing your attention to Monday, April 6th, 1953, I will ask you if you went out the Valley Lumber Yard?

[fol. 309] A. I did.

Q. Who accompanied you on that occasion?

A. Mr. Packard.

Q. And was Mr. Collins there when you arrived?

A. Yes.

Q. Now when you arrived out there on Monday, April 6th, did you have a conversation with Mr. Max Garmon?

A. Yes.

Q. Did Mr. Max Garmon make any explanation to you or to Mr. Collins in your presence as to where Mr. Bill Garmon was at that time?

A. Yes. When we arrived and asked for Bill, Max, I believe, said, "He is in San Bernardino. His mother-in-law is quite ill".

Q. Now after that, or those, introductory questions and answers, did you have a conversation in the presence of Mr. Collins and Mr. Packard with Max Garmon?

A. We went into the same office we usually go into and

after the preliminary conversation we had asked Max if he knew the status and he said he did, that the men had decided that they did not want to go union and that he was not going to force them. Then we had a lengthy conversation as to different yards that had prospered with their peope bleing union and had had no fights with the union and Morrie said to Max, "Max, in most cases that I have been in, and I have been at this a long time, when the employees [fol. 310] change their minds there is usually a reason; either they have been misinformed or some incentive, or have been told not to be union", and Max said, "When I talked to them I told them they could belong to a union or they did not need to belong to a union, but as long as they would do their work that they may have employment here." Then I think there was a little discussion and I was sitting on a box of nail aprons, and I asked Max, I said, "Max, you let the employees know your feeling and how you personally felt, even though you told them that about the unions?" Max said, "sure, that is my feeling. I told the employees I didn't care about unions and I tell everyone."

Q. What was that?

A. "I told the employees I don't care about unions personally, and I have told everyone that I don't, everyone that I talk to about the unions."

Q. Was his statement that he didn't care about unions amplified in any respect?

A. A little later in the conversation Max stated, "For a thousand dollars a year loss of business I wouldn't have the union in here. Of course, in a $10,000 loss I might think differently". I merely asked Max, "You are not setting a goal for us to shoot at, are you?" And there was no answer. We just laughed and after a little conversation departed.

Q. When you departed did you shake hands all around? [fol. 311] A. Yes. We talked of future meetings and I know I complained a little about it. I said, "This meeting and meeting and meeting and we don't get any place, but I am still willing to come back and have further discussions".

Q. Now what was said, if anything, just before Max Garmon made the statement that even if it cost him a thousand dollars a year loss in business that he didn't want to have anything to do with the union?

A. I think that came from the conversation, to the best

of my memory, that we were pointing out how other yards had grown after becoming union.

Q. Now after you left on that occasion you didn't return for a matter of a couple of weeks, did you?

A. That is correct.

Q. Directing your attention to the 17th of April, I will ask you if you went out and had a conversation with Mr. Bill Garmon?

A. On the 17th of April? I believe that was the conversation with Mr. Carlin and Mr. Packard.

Q. That was at a time when Mr. John Carlin of Vista and Mr. Packard were present?

A. That is right.

Q. Now what was discussed in that conversation with Mr. Bill Garmon at the office of the Valley Lumber Company?

A. After we got in the office, Mr. Carlin — I can't remember all the conversation—made some statement that [fol. 312] he had seen Mr. Garmon prior to that meeting and he was in hopes that, through some discussion that we could—in this future meeting arrive at an agreement. Bill informed me that the employees, the same as Max had informed me, were not in favor of becoming union. I told Bill at that time that I felt Max had influenced the employees in his absence. Bill said he didn't think so and that he always consulted with his partners but in the end he was manager of the yard. We talked about many other subjects, as usual, in the conversation, but pertaining to this I think that was it.

Q. In that conversation did Mr. Bill Garmon say anything to you about other business matters that terminated the conversation?

A. That was at the end of the conversation. Bill as we were talking along, he said, "Well, Spud, I have so many things on my mind at the present time". He says, "I am being sued for $50,000 because somebody claims we sold a faulty board and it broke, causing a man to fall". So we left. I said, "I will be back later. I know you are tied up in court and are probably busy, so I will be back later."

Q. Directing your attention to Thursday, April 23rd of 1953, did you go out and talk to Mr. Bill Garmon at that time?

A. I did.

Mr. Todd: What date is that?

[fol. 313] Mr. Whelan: Thursday, April 23rd.

Q. Was that the Thursday immediately preceding Tuesday, April 28th, the day that the picket line was put on the Valley Lumber Company?

A. That is right.

Q. Now in the conversation that you had on that Thursday was there anyone else present besides yourself?

A. Mr. Packard.

Q. And Mr. William A. Garmon?

A. That is right.

Q. And what conversation did you have at that time?

A. I came in, Bill was at the counter, I walked over to the counter and Bill said, "Come back in the office". I said, "There is no use us having one of these long visits we have had previously. I came in to find out if we could get together." He said, "I am afraid we can't." I said, "In that case I am afraid we will have to put a man in front carrying a banner to invite the employees to join." I said, "I don't like to do it." Bill said, "I don't like to have you do it". We shook hands and I walked away.

Q. On the following Tuesday was there a picket established out there?

A. There was.

Q. And directing your attention to the Defendants' Exhibit A, I will ask you if that is the sign or banner that the picket carried out there?

[fol. 314] A. An exact duplication of this sign.

Q. You had more than one sign?

A. Yes.

Q. By the way, did anything happen to one of the signs?

A. Yes. Our picket went across the road for restroom purposes and his picket sign disappeared.

Q. When he came back the picket sign was gone?

A. That is correct.

Q. But all the signs used out there on the picket line were similar to the Defendants' Exhibit A, or, rather, identical with it?

A. Identical.

Q. Now who paid for—who paid the wages of the picket who picketed this establishment?

A. The picket is paid for alternate weeks by the Teamsters' Union and the Carpenters'.

Q. Your organization and the Teamsters' Union, Local No. 36?

A. That is correct.

Q. Now Collins, as Secretary of the Building Trades Council, had nothing to do with the payment of the wages of the picket?

A. None whatsoever.

The Court: Mr. Taylor, does the Council ever pay a picket? Isn't it always up to the individual union that is [fol. 315] involved?

A. No. There is cases where—Well, I might say a large construction job with all the unions involved where the Council may, in some cases, pay the picket.

By Mr. Whelan:

Q. Now Mr. Taylor, you have been out—withdraw that. The picket line was established April 8th, is that correct?

A. April what?

Q. April 28th, pardon me.

A. Yes, sir.

Q. There was a preliminary restraining order issued in this litigation?

A. That is correct.

Q. And was that first brought to your attention on May 8th of 1953?

A. That is right.

Q. And after those papers had been served, was the picket line removed?

A. As soon as Mr. Packard could drive to Escondido.

Q. After the papers were served Mr. Packard immediately went out and took the picket off, is that right?

A. Yes, sir.

Q. Now during the time that the picket was there was the picketing entirely peaceful?

A. Yes, sir.

Q. Now while you were out there on the picket line [fol. 316] were you the recipient of any donations of any kind?

A. Yes. I was traveling the picket and was walking the picket line myself when a car approached from my back and just as it was going by it made a big racket and I felt a little stinging in my shoulder. I looked at the ground and there was marbles rolling all around the street and by the time I saw what happened and raised up the pick-up was way down the highway and I could not get their license.

Q. By the way, did this picket operate entirely on the public highway and off the private property of the Valley Lumber Company?

A. Yes, sir.

Q. There has been some testimony here that across the street there was, on some occasions, as many as four automobiles belonging to representatives of the union. Can you state anything about that?

A. Yes, I think there has been four or maybe five, but at no time have we had over two cars or where the men went to the picket line. We are well acquainted with many representatives and as they come by they will stop and carry on conversations and then go on about their business. In some cases members have stopped and visited and parked their cars there with ours. It is an off-the-highway area and at no time have there been a large group of signs there but there have been five cars there, I believe, at one time.

[fol. 317] Q. Across the street from the Valley Lumber Company and inside the city limits of the City of Escondido, do you know whether or not there are some business houses serving the general public?

A. Yes, there is. Going east, first, there is a hamburger, malt, coffee stand. Adjoining that in the same building is a packaged liquor store and then about half a block on east there is a market and vegetables.

Q. Is there a parking area there for the benefit of the customers of those business houses?

A. Between the two buildings, yes.

Q. There has been some testimony here that you had a conversation with a driver who had brought a load of plywood out to the Valley Lumber Company, is that correct? After he had driven the load into the——

A. That was on the first part of the picket line?

Q. Yes.

A. Yes.

Q. Did you originally attempt to dissuade him from driving his truck into the Valley Lumber Company?

A. No. This driver came and went into the yard, not seeing the picket. He came out and said, "What will I do?" I told him to unload his material.

Q. You did not attempt in any way to interfere with him unloading the material once he had driven on into the yard?

[fol. 318] A. That is correct.

Q. Now that picket line was, as you say, removed after the papers were served?

A. That is correct.

Q. And following the dismissal of the temporary restraining order against picketing, I will ask you, if, on the morning of Tuesday, May 19th, the picket was reestablished?

A. Yes, sir.

Q. And were you or any of your men, as far as you know, notified by telephone that the order restraining picketing had been dissolved?

A. Yes.

Q. Now has a copy of the written order that was made by Judge Turrentine on Wednesday, May 20th, calculating to enjoin secondary boycotting ever been served on you?

A. No, sir.

Q. Now by the way, when you were out there in the vicinity of the picket line were any oranges ever thrown at you?

A. Not at myself.

Q. There has been some testimony here that on the 19th of May, 1953, that a man by the name of Swanson drove up to the Valley Lumber Company, or passed the Valley Lumber Company and then he came back. Do you know anything about that?

[fol. 319] A. Yes, sir.

Q. Will you tell us what you observed in that connection?

A. Upon arrival at Escondido we had not yet got——

The Court: It is eleven o'clock. I think before you start on that we will take our morning recess for fifteen minutes.

A. I am thirsty, your Honor.

(Recess.)

CHARLES O'BRIEN TAYLOR, recalled as a witness for and in behalf of the defendants, having been previously duly sworn, resumes the stand and testifies further as follows:

Further direct examination.

By Mr. Whelan:

Q. I believe when we adjourned I had just started asking you about a man by the name of Swanson and you fix the date of that particular incident as Tuesday, May 19th, about 9:30 A.M., is that right?

A. That is correct.

Q. Now tell us what you saw and who was present there and what happened, Mr. Taylor?

A. There was Mr. Packard, Mr. Aust and myself. Arriving there we did not have a picket as yet so Mr. Packard was carrying the picket sign and while we were waiting for [fol. 320] the picket we were walking along the shoulder of the payment and there came by, approaching us from the rear, this man, and he went right on by and we remarked, "Wonder what that is on the truck", because it was stacked very high and we wondered where it was going. I would say five or ten minutes later the truck returned and pulled off on the shoulder of the road into the parkway and he yelled over, "Is it all right to go in?" Mr. Packard pointed up and said, "There is a sign. Use your own judgment." The truck made a complete circle and returned from the direction—returned in the direction from which it had just come. Getting to the corner, as far as anyone can see from the lumberyard, it turned east going into Escondido. After four or five minutes Mr. Aust and I were talking and said, "I wonder where they are going." We drove down to the corner and turned towards Escondido. About a block or a block and a half towards Escondido was the truck with no driver. Mr. Aust got out of the car and went into the service station. Returning, we made a U-turn and started back to the lumber yard. About a block or a half a block after we started back the truck driver was walking on the opposite side of the street, on the sidewalk. Bob stopped the car and the man came acoss the highway to the car, or across the stree and Bob stepped out of the driver's seat, which was the sid next to the driver, and asked him to what union he belonged

or if he had a card. The can said, "I am an owner-driver. I [fol. 321] don't belong to any union. I don't have any trouble with the unions." He said, "I think they do a lot of good and a lot of bad things." Mr. Aust answered, "My Government does things I don't like, but I like the Government". Then the driver said, "I don't want to take this material back. What can I do?" I was sitting on the off side of the car and I said, "We don't want you to take it back either. Make some arrangements to deliver it to the Company." Then we drove back to the picket line.

Q. Did you tell him to call up the Valley Lumber Company?

A. Yes. He had signified he did not want to go into the picket line and I told him to use the telephone.

Q. Did you ask him not to go through the picket line?

A. No, sir.

Q. You said that the picket had not arrived as yet. Was that the first morning after Judge Turrentine had dissolved the temporary restraining order against picketing?

A. Yes, sir.

Q. Now there has been some testimony that you and Mr. Packard followed the truck of the Valley Lumber Company and I will ask you if that statement is generally true?

A. Yes, sir.

Q. Was that about the same time?

A. A little later, yes.

Q. And did you follow this truck to its destination?

[fol. 322] A. No, sir.

Q. And at any time since the picket line was established did you attempt to prevent any person from delivering any materials to the Valley Lumber Company?

A. No, sir.

Q. Did you at any time prevent or attempt to prevent any truck driver from driving any material away from that yard at any particular point?

A. No, sir.

Q. Did you stop any truck driver driving any material away from that yard?

A. No, sir.

Q. Did you contact any contractor or any customer of the Valley Lumber Company and ask them not to buy any merchandise from the Valley Lumber Company?

A. No, sir.

Q. There has been some testimony that a truck driver from the John Goodwin Construction Company stopped there, and, as a result, Mr. Garmon testified—he said this: "The driver talked to you and then did not go into the yard of the Valley Lumber Company. Do you remember such an incident?

A. Yes, sir.

Q. Do you know the driver of that particular truck?

A. Yes, sir.

Q. Who was the driver of that particular truck?

[fol. 323] A. Ted Magnason.

Q. Does he have any position with the John Goodwin Company?

A. He is superintendent of the construction work in that area.

Q. When he stopped and talked to you on that occasion did he discuss with you anything pertaining to the Valley Lumber Company?

A. No, sir.

Q. Did he discuss some pending election in the District Council of Carpenters?

A. Yes. I might explain that Ted is President of 1571 and also a delegate to the District Council of Carpenters. Used to be President of it. We have been working together many years and as a friend and at the present time, or at that time, in the District Council the nominations for Secretary for the incoming year was going on and he came up to the picket line to want to know how my Local would go. We discussed the interworkings of the organization and Ted said, "Well, I have to go to this school house", which lays about three-quarters of a mile from there, I believe, and he drove away and left me there. Just before he was ready to drive away I did notice Mr. Max Garmon come out in the yard and take our picture. The incident is well in my mind on account of the picture.

Q. You haven't been furnished with a copy of that [fol. 324] photograph?

A. Not as yet.

Q. As far as you know had the John Goodwin Construction Company ever purchased any materials from the Valley Lumber Company?

A. Not to my knowledge.

Q. And as far as you know had Mr. Magnason contemplated entering the yard of the Valley Lumber Company that day?

A. He had not.

Mr. Whelan: Cross-examine.

Cross-examination.

By Mr. Archer:

Q. Mr. Taylor, if on March 28th the men out in the yard signified that they—you thought that they indicated or signified that they were willing to join the union and it is your program, you say, to sign the men up first, and then the employer, why didn't you sign them up that day out there?

A. We have always, in the northern county, taken the men in the presence of the employer and signed—they signed their applications on completion so that he knows it is a fact, and then we sign the agreement.

Q. Why didn't you take the men into the office that day if they indicated they were willing and have them sign at that time in the presence of Mr. Garmon?

[fol. 325] A. That I couldn't answer.

Q. He had told you, both of them had told you, several times prior to that occasion that if the men wanted to join that they would sign, hadn't they?

A. No, sir.

Q. Never had told you that?

A. No, sir.

Q. But you don't know why you didn't take the men in and have them sign up at that time.

A. I can give you my thinking on it. I arrived there, as I said, with only a few minutes to go. Mr. Collins stated he had some additional figures, to reduce that on the agreement as to this foreman's wage and for them to arrive at the average wage which we allow in that contract before we would be ready to do it. He said, "I will go in and talk with the employer". I returned to San Diego.

Q. The only one having any problem, as you related on direct examination, was the foreman?

A. That is right.

Q. So if the other men had been then willing to sign up there was no reason why you couldn't invite them to go into the office and explain their willingness to Mr. Garmon, was there?

A. Not on my part, only that I had to leave.

Q. You know no reason why Mr. Collins and Mr. Aust didn't invite them to go in and announce their wishes to Mr. [fol. 326] Garmon?

Mr. Whelan: That is objected to on the grounds it calls for a conclusion and opinion of the witness.

Mr. Archer: I asked him if he knows.

The Court: Overruled.

A. No, I don't know.

By Mr. Archer:

Q. Does the Truck Drivers' Local, No. 36, get Building Trades Council approval before they do any picketing?

A. I don't know.

Q. Do your men get approval from their District Council before they do any picketing?

Mr. Whelan: That is objected to on the grounds it is irrelevant and immaterial. The District Council of Carpenters is not a party to the action.

The Court: Overruled.

A. Yes.

By Mr. Archer:

Q. I am not clear, Mr. Taylor, as to why you followed Mr. Swanson's truck and material that just came down the highway and drove right on by. Why did you follow it?

A. We didn't follow it at that time.

Q. Why did you follow it after it came back and Packard told Mr. Swanson to use his own judgment?

A. The fact he had turned towards the town of Escondido interested us because he wasn't turning toward any [fol. 327] lumber yard. We would expect him to take it to another yard and we were curious as to where he might be going to dump it.

Q. Why?

A. I would have to truthfully say in that case it was mostly curiosity.

Q. Is your curiosity so great, Mr. Taylor, you want to know where every load of material that is seen on the highways of San Diego County is going to be dumped?

Mr. Whelan: That is objected to on the grounds it is irrelevant and immaterial, calls for a conclusion and opinion of the witness.

The Court: I think he ought to explain his answer.

Mr. Whelan: Well, your Honor, if I see in the Transcript a fellow that I think is a client of mine has filed a lawsuit with another lawyer I might be curious and I might make an inquiry but I don't think it would make very much difference.

The Court: I will sustain the objection to the last question. I don't think he has answered the other one.

A. Which?

The Court: The previous one.

A. Could I have it read?

The Court: Read it b-ck.

(The record read by the reporter.)

[fol. 328] Mr. Archer: What was his answer?

(The record read by the reporter.)

By Mr. Archer:

Q. Why were you curious about it?

A. Well, as I said, it was about five minutes before we went on down the road. We got to talking, "Now where in the world could he be taking that to?"

Q. Why did you care where he was taking it to or why did you care on that occasion?

A. On that part, it is of interest in the organization to know what is happening and where the material is going because we can quite often use friends to assist us in talking to the people we are trying to organize.

Q. And by "friends" who do you mean?

A. Well, we have many contractors and I have many lumber yards in the county who are very friendly to myself and the organization. And they have the opportunity to come in contact with these people and I am quite confident they would assist in putting in a good word.

Q. Does that have anything to do with inviting the men to join the union?

A. That is part of an invitation, if you can get other people to see it is a good thing.

Q. In other words, if you followed Swanson's truck to some job where there was a contractor who was a friend and that contractor said something to Swanson, a good word, as [fol. 329] you put it, that would have something to do with inviting the men back in the Valley Lumber Yard to join the union?

A. I think so.

Q. How does it operate?

A. Anytime I can establish our good faith and good reputation it will help, definitely.

Q. This man Swanson is from Riverside, is he not?

A. Somewhere up in the northern end, I don't know.

Q. So you thought if you could find out what job this load was going to and the contractor was a friend and that contractor put in a good word with you to a man from Riverside, that that would help you invite the men in the Valley Lumber Yard to join the union, is that your testimony?

A. Yes.

Q. You have no belief, do you, Mr. Taylor, that these men in the Valley Lumber Yard are psychic, have you?

Mr. Whelan: That is objected to as frivolous and immaterial.

The Court: Sustain the objection.

By Mr. Archer:

Q. Did you ever tell any contractor that the Valley Lumber Yard was being picketed?

A. No, sir.

Q. Did you ever ask any contractor to put in a so-called good word to any material men or delivery truck drivers? [fol. 330] A. No, sir.

Q. When did your union get authorization from your Council to picket the Valley Lumber Company?

A. As to the exact date, I am sure I couldn't answer. It was just shortly prior to the placing of the picket the first time.

Q. You had had no prior authority in the year of 1952?

A. No, not as specifically—not on that yard, no.

Q. Did you have any on all non-union yards in the north county?

A. No, sir.

Q. Did you have authority from the Council when you told Mr. William Garmon that the boys would be out in front soon?

A. Yes.

Q. How long prior to that?

A. Within a week.

Q. Within a week prior to that time you had obtained——

A. To the best of my memory, yes.

Q. So you had obtained the authorization to picket the place before you knew whether the men were going to join or not, is that right?

A. No, sir.

Q. I thought that, on the date that you say you called on him, you were then asking that they sign a contract?

A. That is correct, but we were informed that they [fol. 331] weren't by Mr. Max Garmon previous to that and I was in hopes it could be worked out and with Mr. Garmon also.

Q. On this occasion that you say you followed another one of the company's trucks but you didn't follow it to its destination, you saw Max Garmon following you, did you not?

A. No, sir.

Q. You did not see him parked watching you?

A. I saw him but he wasn't following me.

Q. You saw him and the company's truck turn off and go to another yard?

A. No, sir.

Q. Where did it go?

A. I don't know where it went. I don't know the streets but I was traveling east along side of the Lou Solomon job and getting close to the corner of the project. Max came from my left and turned facing my car. He went on to town in the opposite direction and I turned and went about two blocks and I saw the truck was leaving the City of Escondido and I returned and was back at the yard near the same time Mr. Garmon was.

Q. How many times have you followed trucks attempting to make deliveries.

A. Twice besides that, I believe.

Q. Referring now to the company trucks.

A. Yes, sir.

Q. How many times have you followed the trucks of other [fol. 332] companies trying to deliver materials to the Valley Lumber Company?

A. The one time.

Q. Just that one time. Now you testified that you were never served with a copy of the temporary injunction issued by or signed by Judge Turrentine, is that right?

A. As I understood it, the one I said I was never served with was the one after we returned.

Q. Yes.

A. I was served—a Deputy Sheriff came and served me with papers restraining picketing and everything and I did receive that, yes.

Q. You, however, knew, did you not, that the other one, the temporary injunction was served on Mr. Seton Lawson, the President of your union?

A. I was told by our attorneys and Thursday night of our last meeting Mr. Lawson said he had been served. I might say I asked him why he didn't tell me sooner and he said he thought I knew all about it.

Q. And you did, didn't you?

A. Only what I have been told, yes, as I just stated, by the attorney.

Q. Who do you refer to now told you about it?

A. Mr. Whelan.

Q. Did he tell you the Court enjoined the interference with customers?

[fol. 333] A. He told me we were enjoined on secondary boycott.

Q. It was after that that you were following the trucks?

A. Yes, sir.

Q. Why?

A. For the purpose I have said before that if I knew the people within the town there of Escondido that were friendly to ourselves I would later probably go by and ask them the next time the boys come to tell them it would be

good to join the union, tell them how you have been able to get ahead and give us a little hand.

Q. You would tell the contractors to tell the truck drivers?

A. No.

Q. Who?

A. The friendly employees is who I hoped to talk with.

Q. You would talk to the members of the union on the job and tell them to talk to the truck drivers?

A. That is correct.

Q. That wouldn't have any application to the truck drivers attempting to make deliveries?

A. No.

Q. So that wasn't the purpose of following Swanson?

A. That is correct. But I didn't know but what Swanson might return to the yard many times.

Q. What would that have to do with it?

[fol. 334] A. If he felt favorable he might also, in going to the yard, talk with the boys. I didn't know whether he would deliver there or not.

Mr. Archer: I have no further questions.

Redirect examination.

By Mr. Whelan:

Q. By the way, I neglected to ask you, Mr. Taylor—I would like to have this card marked Defendants' Exhibit C for identification.

The Court: Defendants' C. Did Mr. Archer see it?

Mr. Whelan: Yes, I showed it to him during the recess.

The Court: Do you want it marked for identification or do you want it to be used in evidence?

Mr. Whelan: I want it to be in evidence, but——

Q. Mr. Taylor, I will show you Defendants' Exhibit C for identification and I will ask you to tell me what it is and how that card is used by the Millmen, Local No. 2020, and by the District Council of Carpenters?

A. This is a card gotten up by the organization more or less on a promise to the yards in the Oceanside area and the northern end that any of those who were in contractual relations with us we would do our best to advertise those yards and help them in their business. We have been hand-

ing these to people that ask us "Where can we secure union materials nad things"? We hand them this and say, "Here [fol. 335] is a list of those affiliated with us."

Q. Has this practice been continued for some time?

A. Quite some time.

Mr. Whelan: We will offer it in evidence, if your Honor please.

Mr. Archer: May I inquire of him first, your Honor?

The Court: Yes.

By Mr. Archer:

Q. That is not the card that was used to circularize the contractors in September, 1951, was it?

A. Not that far back.

Q. When was this one put out?

A. I am not entirely sure. That was put out several months ago in the fall of the year. I would have to look at my office for dates on it, but it has not been used prior to my working with this.

Q. Do you have a copy of one, the one originally issued when you started this organizational drive?

A. No, sir.

Mr. Archer: I have no objection.

The Court: May be received as Defendants' C.

By Mr. Whelan:

Q. Do I understand you to say this was first put out in the fall of the year of 1952, or perhaps around the first of the year of 1953?

A. Somewhere around that time.

[fol. 336] Mr. Whelan: That is all the questions I have.

The Court: You may step down.

A. All right.

Mr. Whelan: Call Mr. Packard.

ALBERT PACKARD, called as a witness for and in behalf of the defendants, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Whelan:

Q. Will you state your name in full, please?

A. Albert Packard.

Q. Is that spelled P-a-c-k-a-r-d (spelling)?

A. Yes, sir.

Q. And what is your business or occupation at the present time?

A. I am Business Representative for the Millman's Union, San Diego.

Q. Is that the same Local that has been a party defendant in this action?

A. Yes, sir.

Q. Are you acquainted with Mr. Jack Rutledge?

A. Yes, sir.

Q. And when and where did you first meet him?

A. Oh, I think I met Jack about five years ago when I was an employee of the American Mill and Manufacturing. [fol. 337] Q. He has testified that he was introduced to you by a Mr. Mark Tweed?

A. That is right.

Q. Was Mark Tweed then an employee of the Valley Lumber Company?

A. Yes, sir.

Q. What was Jack doing for the Valley Lumber Company at that time?

A. He was a fellow that come in with a truck and would pick up different millwork which we had manufactured for the Valley Lumber Company.

Q. During the time he was doing that sort of work did you become more or less friendly with him?

A. Yes, sir. He used to come in there about two or three times a week and my job, of course, working around the mill, was to see our customers and everybody would get all their material and put it in the trucks that went far out in the country, see that they got all of it, and we got fairly

well acquainted and around a mill like that where it is pretty well organized, naturally I asked him if he belonged to a union and he said no. The next time he says, "You know the Valley Lumber Company——"

Mr. Archer: Just a minute. I object to any hearsay conversation with Jack Rutledge about what transpired some five years ago.

The Court: I forget just now who is Rutledge?

[fol. 338] Mr. Whelan: He is the working foreman out there and I cross-examined him about whether or not he knew Mr. Packard and he said he did and had known him when Mr. Packard worked for the American Manufacturing and Milling Company. I asked him if he had ever invited Mr. Packard or any representative of the union to talk to the employees of the Valley Lumber Company and he said no.

The Court: Overruled. You may answer.

A. As I say, in these conversations we had we talked about the organization. It didn't take just one, two or three days, whatever it was. He said would there be a chance of having a labor representative come out and just talk to the fellows. I says, "Yes, I think so". I says, "I will get hold of the representative of the Millmen's Union and see if they can't go out and talk to the men". I didn't see him any more. That had been in a period, a period of maybe a year or two. I didn't see him again until about two and a half years ago when I went to work for the Millmen as a representative.

Q. Up to two and a half years ago you were not a Business Representative for the Millmen?

A. No, sir.

Q. Now do you remember my asking Mr. Rutledge on the witness stand if about two or two and a half years ago Mr. Packard and Mr. John Lyons came out to the Valley Lumber [fol. 339] Company and talked to them?

A. Yeah, I remember that.

Q. He didn't know of Mr. Lyons by name and I gave him a sort of a physical description of him?

A. Yes.

Q. Is it true you and Mr. Lyons were out there talking to Mr. Rutledge?

A. He vas—I mean, he was there with a few of the group the day we arrived, yes, sir.

Q. When you were out there on that occasion, was there any indication from the employees of the Valley Lumber Company that they would like to become members of the union?

A. Well, I don't know—I don't think Jack did anything but he was in the presence of these men. I don't know, maybe some were working and maybe not. We have a list of the names of the fellows, I think, but they was talking how our organization was working and when we would get busy because a lot of carpenters in that district were raising the dickens because they didn't belong, and I said I realized that and we were trying to organize the jobs along the coast and that was my job and as soon as we got that straightened out I thought that with the good relations we were having in Escondido it would be very easy. I said, "I think you have got some pretty good employers out here and if we could show them the competition with wages and conditions on the coast are level with you fellows, I think [fol. 340] we can make a good job."

Q. Did some of the other employees, other than Rutledge, indicate they were interested and wanted to join a union?

Mr. Archer: To which we object no foundation, no evidence that these people he is talking about were employed in March or April of this year.

By Mr. Whelan:

Q. Did this conversation take place in the Valley Lumber Yard?

A. Right in t e yard, yes.

Q. And Mr. Rutledge was there?

A. Yes, sir, he was present.

Q. And did he introduce you to the men to whom you talked?

A. Again?

Q. Did he introduce you to the men with whom you talked on that occasion?

A. No, I don't think there was any introduction. I knew Jack and I just called him Jack, that is all.

Q. I mean, but as to the other people, did he introduce you to those other people?

A. No, sir.

Q. But you did take their names?

A. I didn't, Johnny Lyons did.

The Court: At this time we will take our noon recess. [fol. 341] Return at two o'clock. I have some other matters to take care of between 1:30 and 2:00. Return at 2:00.

(Noon recess.)

The Court: You may proceed with this Garmon matter.

Mr. Whelan: Mr. Packard, will you take the stand.

ALBERT PACKARD, recalled as a witness for and in behalf of the defendants, and having been previously duly sworn, resumes the stand and testifies further as follows:

The court: Who was examining who?

Further direct examination.

By Mr. Whelan:

Q. I think at the time we adjourned we were just going to inquire into the deal about a driver by the name of Swanson, however, before I take that up I want to ask you while you were a member of the staff, so to speak, or a Business Representative, of the Millmen's Local, No. 2020, did you receive a call from any of the employees of the Valley Lumber Company?

A. Yes, I did.

Q. Following that call did you go out to the Valley Lumber Company?

A. No, I think during the conversation over the telephone I told them that we would be out at a later date.

[fol. 342] Q. Now, getting down to Tuesday, May 19th of 1953, which was the morning that the picket was resumed after the temporary restraining order against picketing was dissolved, were you out there with Mr. C. O. Taylor and Mr. Bob Aust?

A. Yes, I was.

Q. And did you see this truck driver who has been identified as a Mr. Swanson?

A. Yes, I did.

Q. Just tell the Court what you saw in his operation of the truck?

A. That morning when we come onto the picket line we did not have a picket there so Mr. Taylor and myself started this picket line and about, oh, I guess fifteen or twenty minutes Bob Aust drove up and he come over and was talking and we were walking the picket line and then we noticed this truck coming east on the north side of the highway. It went past the picket line and he looked over and saw the picket walking there and he just kept on going and then, oh, he went around the corner there and I don't know, a few minutes later, why he came along and come back and made a turn to the yard. As he made the approach to the yard he hollered, "Is it all right?" He had to holler because it was far enough away where he put his hand to his mouth and hollered, "Is it all right if I go through the picket line?" I pointed to the sign and said, "Use your own judgment." At that time he drove away.

[fol. 343] Q. You had no further—withdraw that. After he drove away did you see him anymore?

A. No, I don't think so.

Q. Now after the picket line was first established on April 28th and up until the time it was discontinued on May 8th, was the picketing peaceful?

A. Yes, it was.

Q. Now did the picket travel on the highway or was he on the private property of the Valley Lumber Company?

A. Well, that is hard for me to saw which is private property. We were just off the highway and there is a fence which I don't know whether it determines the private property or not. There is no sidewalk there whatsoever and we just walked as close to the highway as we possibly could.

Q. You mean as close to the concrete portion of the highway?

A. That is right.

Q. So that you would be traveling on what would be called the shoulder of the highway?

A. Well, you could call it that. I thought maybe it was a sidewalk.

Q. There was no sidewalk there?

A. No, none whatsoever.

Q. Were you outside of the telephone pole lines?

A. Yes, sir.

Q. In other words, a line between the telephone poles [fol. 344] would be on one side of where the pickets traveled and the paved portion of the highway would be the other side?

A. That is right, sir.

Q. You never saw anybody on the picket line or any representative of the unions trespassing on the property of the Valley Lumber Company, did you?

A. Not while the picketing was going on, no, sir.

Q. Now on the street, on the other side of the highway from the Valley Lumber Company are there some stores that are open to the public?

A. That is right, sir.

Q. And among other things did you call on that picket line pretty regularly in order to observe what went on there?

A. Yes, I was assigned to that particular part of the operation, sir.

Q. And did you observe any acts of violence toward anyone picketing?

A. A couple of times there was oranges and marbles throwed at the picket.

Q. Were there any acts of violence of any kind on the part of anyone doing any picketing, directed towards either the officials of the Valley Lumber Company or its employees?

A. That has always been our practice not to do so.

Q. I don't care what your practice has always been. On this particular occasion I take it there was no act of violence towards anyone?

[fol. 345] A. No, sir.

Q. Were you in the car with Mr. Taylor about the same time, around about the 19th of May, when that truck was followed?

A. The dates are a little mixed in my mind, but is that the truck that followed east out of the Valley Lumber Company where Mr. Garmon met us?

A. Yes, that is the same situation.

A. Yes, sir, I was.

Q. Now, Mr. Packard, did you ever attempt to prevent anyone from going into the Valley Lumber Company?

A. No, sir.

Q. Did you ever stop any truck and interfere with any deliveries of any kind?

A. No, sir, I never have.

Q. Did you ever talk to any contractor or customers of the Valley Lumber Company for the purpose of attempting to dissuade such a person or persons from purchasing material from the Valley Lumber Company?

A. No, sir.

Mr. Whelan: You may cross-examine.

Cross-examination.

By Mr. Archer:

Q. How long have you been a Business Representative of Millmen's Local?

[fol. 346] A. Approximately two and a half years.

Q. How long ago was it you were employed by American Manufacturing and Milling?

A. Oh, I would say two and—about three years.

Q. It was while you were so employed that you had the conversation you related with Jack Rutledge?

A. Yes, sir.

Q. You say that you were with Mr. Taylor at the time you followed one of the Valley Lumber Company trucks in a car, is that right?

A. Yes, sir.

Q. Why did you follow the truck?

A. Well, that is something that is hard to explain. We wanted to know where this material was going and what job it might have been being delivered on.

Q. Why?

A. That has been my practice to always find out where these materials are going, talk to the contractor or our friends and tell them our proposition, what is going on, and explain to them that we have always—as there is questions asked to that we can answer them and in turn they

will talk to the drivers or even the companies, of the relations we have had with them.

Q. You say that it is always your practice to talk to the contractor or your friends and tell them your proposition and tell them what is going on, is that right?

[fol. 347] A. Yes, sir, explaining our contract to them, or lots of times they want to know—some people are ignorant of the fact what may be written in that contract might hurt a man by joining a union, and I usually explained to them and show it to them in black and white that is not to hurt anybody.

Q. It was your purpose to follow this load of material out to some job and if you found a contractor out there, or a friend, as you put it, you were going to tell them what was in your contract?

A. That has been my policy, yes.

Q. Was that your intent to do that on this occasion?

A. I don't know whether it was or not. We just followed it out of town, a little bit, and we were sure it was none of our people or any contractors or any of our friends in that district so we turned around and went back.

Q. That was after you saw Mr. Garmon?

A. I don't know whether it was after or—it was along the highway there and there is no cross streets and you had to come up to where Mr. Garmon was standing.

Q. You say that you did go out and follow a truck of materials and if you found a contractor out there or a friend you would tell them what was going on. What do you mean by that?

A. That has been our policy to talk to them.

[fol. 348] Q. I understand you to say that had been your policy and custom but what I want to know is, you say you would tell them what was going on?

A. What I mean, if that they would ask me if there was a picket line I would say yes, there was a picket line there.

Q. That is what I thought. You have told various contractors in that area that there is a picket line on the Valley Lumber Company, have you not?

A. No, I don't think I ever told anybody in Escondido Valley, contractors or anything.

Q. Never mentioned that to a soul?

A. No, sir, not to any of the contractors. You said contractors.

Q. Yes. Anybody else?

A. No, I don't think so.

Q. You said you limited it, apparently, to contractors and now did you mention the fact there was a picket line on Valley Lumber Company to anybody else?

A. No, I didn't tell any of them that, because we didn't contact any of the contractors or any of the men, I didn't.

Q. You did not?

A. That is right.

Q. Anybody else?

A. Not that I know of.

Q. Did you follow any other trucks?

[fol. 349] A. Yes, I think we did follow another truck.

Q. Tell us about that one.

A. All right, sir. We went out, I think it is north, or west, of the Valley Lumber Company and they had a load of insulation and they turned one block from the yard and went south. I went on to 395. 395 at the main drag of the main thoroughfare of Escondido, we turned left and by that time that truck had gone up that second street onto a couple of blocks from there and we went to Penny's store. Then we stopped at Penny's for a minute. We were looking for, I think, the superintendent on the job and he wasn't on the job, so we went on to the next street and went south again and passed a school and on over to, I believe it is Fifth and Escondido. There is a contractor building a place there and Mr. Collins says, "I have to check this job", so as I got out of the car I looked down the street, which that would be Escondido Avenue, and saw one of Valley Lumber Company's—this same truck, rather, with this insulation, but it was parked two blocks away. Carlin went in to talk to the members, which he always does.

Q. Who went in?

A. Mr. Carlin. He went in and talked to the members and checked the cards and I don't know what they talked about, I stayed on the curb and watched. About that time this truck moved away so when Mr. Carlin come back he asked me where the truck went to. I says, "I don't know."

[fol. 350] He says, "I have got a job to do up in the next

block. Would you care to go with me?" I said, "Sure, let's go check." So on the way back we come back to this job and Mr. Ira Johnson, the contractor, was there and Carlin says, "Do you know Mr. Johnson?" I said, "I don't know him". He says, "Let's get off and go talk to him and I will introduce you to him." At that time we did and Mr. Carlin introduced me to him, for which I had already known him for a long time in San Diego, and we talked about old times and we asked about some insulation he had on the job. "Are you going to put that on the roof?" He says, yes. I says that that is a good deal. I says, "I understand the roofing contractors are out on strike. Are you going to have trouble with the roofing contractors?" He says, "Oh, I don't think so." We talked a little longer on something that didn't even concern me or anybody else, just talking about old times, and then just walked off the job.

Q. The installations that you saw there at the Ira Johnson job were the same you saw on the truck, weren't they?

A. I wouldn't say that. I think there was two different ones. One was Firtex and the other was something else, I think.

Mr. Whelan: Do you mean "installation" or "insulation"?

Mr. Archer: Did he say "insulation"?

Mr. Whelan: I thought he said "insulation".

[fol. 351] Mr. Archer: Insulation.

Q. Now you say "We". Was that Mr. Collins?

A. Carlin.

Q. Oh, Carlin?

A. Uh-huh.

Q. What is his official capacity?

A. He is the Business Representative of the District Council of Carpenters in that district.

Q. In these minutes that we had yesterday under date of October 2, 1951, is an entry which read as follows:

"Reported that the Carpenters have signified their desire to no longer cooperate with the Building Trades Council but that the Carpenters' representative in the northern part of the county is continuing to cooperate in the organizational campaign for the lumber yards".

Was that referring to Mr. Carlin?

Mr. Whelan: That is objected to on the grounds it is not proper cross-examination; calls for a conclusion and opinion of the witness as to what is meant by the Building Trades Council's minutes.

The Court: I will sustain the objection.

By Mr. Archer:

Q. Is Mr. Carlin the Carpenters' representative in the northern part of San Diego County?

A. Yes, sir.

Q. Why did you follow this load of insulation?

[fol. 352] A. I just wanted an idea about where it was going.

Q. Why?

A. For the same reason I stated before. I just like to see some of our friends while in that territory.

Q. And if there were any, what would you do?

A. Like I have always done, talk to them and tell them our purposes and to help us organize the men up there if we could.

Q. Ask them to help you organize the men at Valley Lumber?

A. That is right, uh-huh.

Mr. Whelan: What was that last question?

(The record read by the reporter.)

Mr. Whelan: He answered "yes"?

(The record read by the reporter.)

By Mr. Archer:

Q. You say that after the truck got out of sight you drove to Penny's store?

A. Yes, sir.

Q. That was under construction at that time?

A. In the finishing stages, yes, sir.

Q. And supplies for that were being sent from Valley Lumber Company?

A. I don't know, sir. I don't know.

Q. What did you go to Penny's store for?

A. I just said that Mr. Carlin wanted to see the [fol. 353] superintendent on the job. I don't know whether he is a member of Vista Local, or who he is. He just wanted to see the superintendent on the job.

Q. Did he see him?

A. No, sir.

Q. Did you talk to any of the men on the job?

A. No, sir.

Q. Didn't go on the job?

A. We went in the door and they were putting in a lot of fixtures, if that is going on the job. I didn't, but Mr. Carlin asked some people around there, a man sweeping around, if the superintendent was in and he said he did not know.

Q. Then what happened?

A. We got in the car and went on down the street.

Q. Then you went to visit this job at Fifth and Escondido?

A. That is right. Routine checking.

Q. What do you call it, routine checking?

A. Routine checking.

Q. You didn't go on that job with Mr. Carlin?

A. Not to start with. On the way back we stopped back and he introduced me to Ira Johnson.

Q. On the way over you didn't go in?

A. No, sir.

Q. When you talked to Ira Johnson on your way back [fol. 354] did you say anything about the Valley Lumber Company?

A. It wasn't even brought up, sir.

Q. No mention of it at all?

A. No, sir.

Q. Did you follow any other trucks?

A. Not that I remember, sir.

Q. Did you see any of the other representatives follow any trucks?

A. Yeah.

Q. Who?

A. Brother Aust—I mean Mr. Aust and Mr. Taylor.

Q. What truck did you see Aust follow?

A. That was the truck of—from Fontana, or up in Riverside someplace, with a load of insulation.

Q. Any other trucks that you saw Aust follow?
A. Not that I remember, sir.
Q. Who all was out there on the picket line?
A. You mean——
Q. Representatives of the various unions?
A. At one time or various times?
Q. We have had mention of Taylor and Carlin and Collins and Aust and yourself. Who else was around?

Mr. Whelan: Object to that——
Mr. Holt: Collins was never on the picket line. There is not one word of it.
The Court: I don't think he was.
[fol. 355] Mr. Archer: If I said "on", I mean around the premises of the Valley Lumber Company.

A. Outside of the men you have just mentioned?

By Mr. Archer:

Q. Yes.
A. No, I don't think so.
Q. What was the name of the picket?
A. Oh, gosh.
Q. Prosser?
A. I think that is the name of the picket—the name of the picket we have got now. The man before that was Roberts.
Q. Do you know where they are from?
A. Definitely, no; but through rumor they live in Escondido.
Q. Are they members of either of these two unions?
A. By that you mean they belong to the Carpenters' Union or Millmen's Union?
Q. Or the Truck Drivers' Union?
A. Mr. Roberts was a member of the Carpenters' Union.
Q. Carpenters' Union?
A. Uh-huh. In Vista.
Q. The Carpenters' Union aren't trying to organize Valley Lumber Company, are they?
Mr. Whelan: That is objected to on the grounds it is argumentative and calls for a conclusion and opinion.
[fol. 356] The Court: Overruled.

A. I don't know, sir, how you would explain that. We are part of the Carpenters' organization, the Millmen's Union.

Q. You are a member of the same Council and the Carpenters are helping you on this organizational drive?

A. That is right.

Q. Is Prosser a member of any of these unions?

A. I am not sure. I think he belongs—well, I should know, but I don't.

The Court: Maybe he doesn't belong to any union.

A. I think he does. I think Mr. Carlin was the one that got that for us.

By Mr. Archer:

Q. You are in charge of this particular project, as you put it, I think, didn't you?

A. More or less, yes, sir. I am there most of the time, whenever I can get on the job.

Q. Did you ever see Mr. Carlin follow any truck other than this time you went with him to the Ira Johnson job?

A. I think—there were so many things happened—I think that was the only time, sir.

Q. What was happening? So many things happening. What was going on out there that consumed your attention?

A. My job isn't only to be there all the time. I have other jobs to do here in the City, sir, pertaining to the [fol. 357] Millmen's Union.

Q. Mr. Taylor said this morning that there were sometimes as many as five cars parked out there. Can you identify who the owners of those cars were?

A. Well, just like I said, there was other representatives coming there at times and naturally they have other work to do so they drive their own cars. Outside of the six or seven men that was already mentioned, I don't remember of any others, I mean, of the organization.

Mr. Archer: I have no further questions.

Mr. Whelan: That is all. Thank you.

The Court: I want to ask you a question or two. Maybe both sides wish to object. While this picketing was going on out there were you in Escondido all the time?

A. Not all the time, sir.

The Court: About how much of your time was spent down there?

A. I would say about fifty per cent of my time.

The Court: During this period of time did you follow the trucks of the Pine Tree Lumber Company?

A. No, sir.

Mr. Whelan: That is objected to on the grounds it is immaterial to the issues here.

The Court: I will overrule the objection. Did you follow any trucks of the Escondido Lumber Yard?

A. No, sir.

[fol. 358] The Court: Were they union yards?

A. No, sir.

The Court: You didn't pay any attention to their deliveries?

A. No, sir.

The Court: O. K.

Mr. Whelan: Mr. Aust.

Robert F. Aust, called as a witness for and in behalf of the defendants, and being first duly sworn, testifies as follows:

Direct examination.

By Mr. Whelan:

Q. Your name is Robert Aust?

A. Robert Frank Aust.

Q. You have been referred to in this testimony as Bob Aust?

A. That is right.

Q. Where do you live, Mr. Aust?

A. I live in National City. 2947 Ridgeway Drive in National City.

Q. What is your business or occupation at the present time?

A. I am Assistant Business Agent for Local No. 36, Teamsters.

Q. And that is one of the defendants in this action, [fol. 359] that organization?

A. That is right.

Q. Who is the Secretary and General Manager?

A. Mr. Clarence Wernsman.

Q. Do the Teamsters contribute, Teamsters' Local No. 36, contribute to the wages of the pickets that have been on the line in front of the Valley Lumber Company's yard?

A. Well, Mr. Wernsman takes care of all that in our office, but just through the talk I have heard go on I imagine they do.

Q. Since the picket line was established in front of the yard of the Valley Lumber Company on April 28th and up to the time the picketing was discontinued on May 8th, did you have occasion to go out there to the premises?

A. Yes, I was there several times.

Q. And did you ever carry the picket banner at any time?

A. Yes, I relieved the picket several times, would carry his banner when he went over to the service station.

Q. Was the banner identical with Defendants' Exhibit A for identification—or rather that has been introduced here?

A. Yes.

Q. Now, on one of these occasions did you notice any act on the part of the driver of any vehicle that seemed a [fol. 360] little bit out of the usual to you?

A. Just that one time I was walking east and there was a Chevrolet panel job, probably a '46 or '47 model, which was traveling west, and it was in the later afternoon, the sun was going down and he cut off the pavement, clear off into the dirt at me, then cut back onto the pavement and because of the combination of the sun and the dust kicked up by his wheels I wasn't able to get his license number.

Q. Do you know where that panel truck came from?

A. No, I didn't notice.

Q. Now did you ever see any act of violence of anyone picketing out there towards the Valley Lumber Company's officials or any of its employees?

A. I never did.

Q. Directing your attention to the morning of Tuesday, May 19th, 1953, which would be the day after Judge Tur-

rentine dissolved the temporary restraining order, were you out there with Mr. Taylor and Mr. Packard?

A. Yes.

Q. And did you notice anything unusual that morning while you were there with Mr. Packard and Mr. Taylor?

A. Just that load of light weight plaster that came there and hollered at Al if he had any objection to going in.

Q. What did Al reply?

A. He pointed to the sign and told him to use his own [fol. 361] judgment.

Q. What did the driver of that truck then do?

A. He swung around and went east to the boulevard stop and then turned south. As he went to turn south we couldn't see him any more. He was out of our vision.

Q. Did you thereafter accompany Mr. Taylor in an automobile?

A. Yes, we got in my car and went down to the boulevard stop, and we could see the truck parked but the driver wasn't in it, so I went on down to the service station and the driver wasn't there so Spud and I started back over to the Valley Lumber Company. As we started by the truck, this driver of the truck came out of a phone booth and I slowed down, almost stopped, and he saw us and walked over to the car. I got out of the car and told him who I was and asked him if he belonged to any Local and he said, "No, I don't belong to any Local. I am an owner-operator". He says, "Just because I don't belong to any Local is no sign I have got anything against unions". And then he said that he had never—he said he got along with all unions and the reason he did was because he had never been through a picket line and he was too old to start now. Then he says, "I sure would hate to wind up taking this load back to Los Angeles. What should I do?" Spud told him to call the Valley Lumber Company and ask them where they wanted it delivered. We got in the car and drove back over there.

[fol. 362] Mr. Archer: May I have that answer read, please?

The Court: Read it back.

(The record read by the reporter.)

Mr. Archer: Thank you.

By Mr. Whelan:

Q. Now during all of the time that there was a picket line in front of the Valley Lumber Company was there any picketing carried on against the Pine Tree Lumber Company or the Escondido Lumber Company?

A. Not that I know of.

Q. And you were informed, were you not, that the Pine Tree Lumber Company and the Escondido Lumber Company were taking deliveries for the Valley Lumber Company?

A. I understood they were, yes.

Q. But there wasn't any attempted action taken against either one of those two companies, the Pine Tree or the Escondido?

A. Not that I know of.

Q. Now did you at any time attempt to interfere with anyone going into the Valley Lumber Company?

A. I never did.

Q. Did you at any time interfere with Valley Lumber Company making any deliveries of any kind?

A. No.

Q. Now did you stop any truck of the Valley Lumber Company?

[fol. 363] A. No.

Q. Did you attempt to persuade any contractor or any customer of the Valley Lumber Company from doing business with the Valley Lumber Company?

A. I didn't talk to any of them.

Mr. Whelan: Cross-examine.

Cross-examination.

By Mr. Archer:

Q. Is the license number of your car 1 B 76774?

A. That is right.

Q. Then it was your car that followed the Valley Lumber Company truck out to Mt. Palomar on April 29th, was it not?

A. I don't know exactly what day it was but we went to Mt. Palomar road behind a Valley Lumber Company

truck and it wasn't the license number you have got down there, either.

Q. What is the number?

A. That was on the other car.

Q. What other car?

A. A green Pontiac.

Q. Whose is that?

A. That did belong to Local No. 36.

Q. Belongs to the Local?

A. The one you are referring to about that load to [fol. 364] Mt. Palomar was made in the car before they got this one they have got now, so the license number you quoted is the one on this car I am driving now.

Q. But you went out to Mt. Palomar in the car you had before that one, which was a green Pontiac?

A. That is right.

Q. That is about 20 or 25 miles from Escondido, isn't it?

A. I don't know just how far it is.

Q. You drove the car, didn't you?

A. Yes.

Q. Why were you following the truck out there?

A. We had other work to do. We stopped at Valley Center and talked to some people.

Q. Why did you follow the lumber company's truck to Mt. Palomar?

A. We just followed it out there.

Q. What for?

A. When we got to the top of the hill we turned around and come back.

Q. Why?

A. We wanted to find out where it was going.

Q. Why?

A. Because I wanted to find out if there was any jobs going on any place.

Q. Suppose there had been one?

[fol. 365] A. I would stop and talk to the men and find out who they were.

Q. Why?

A. Because that is part of my job.

Q. To find out who they were? I thought you were in the Teamsters' Union. If the men were on the job——

A. If there were any trucks involved, that was part of my job. On a building, the materials are always moved by trucks.

Q. You say the men working on the job. You meant the Teamsters working on the job?

A. That is right.

Q. You followed that truck out again on May 27th, didn't you, along towards the end of May?

A. Where?

Q. To Mt. Palomar?

A. No.

Q. Do you know who it was that was driving that car out there?

A. No, I don't.

Q. Did you follow a truck of the Valley Lumber Company to the Dwight Housen job?

A. I don't even know where that job is.

Q. Who was with you when you went out to Mt. Palomar?

A. Al Packard.

Q. Did you find the job out there where the truck [fol. 866] went?

A. No, we turned around and came back.

Q. Did you get tired following the truck?

A. No, we weren't tired.

Q. Why did you turn around and come back?

A. I had other work to do.

Q. As I understood, you said that Mr. Taylor advised the driver of this load of light weight plaster to call the Valley Lumber Company and find out where he was to take—where he should take the load, is that right?

A. That is right.

Q. Well, didn't the man say that the load was consigned to the Valley Lumber Company?

A. He didn't say and I don't remember of anybody asking him.

Q. You knew he was going to take it to the Valley Lumber, didn't you?

A. No, I didn't know where he was going to take it.

Q. You asked him—you went up to him and asked him if he belonged to a union, didn't you?

A. Yes, I asked him if he was connected with any Teamsters' Local. He walked over to my car.

Q. Did he speak to you first?

A. That is right.

Q. He asked you if it was all right——

A. No, he didn't ask me that.

[fol. 367] Q. What did he say?

A. First I asked him if he was connected with any Local and he told me he was not, and after the conversation——

Q. What was the conversation? What did he say when you asked him that?

A. He told me, one thing he told me was that he didn't belong to any Local but he had never had any trouble with any unions and the reason he hadn't, was because he had never been through a picket line and he was getting too old to start now.

Q. Then what was said?

A. He said he sure would hate to wind up taking this load back to L.A.

Q. Why would he say that?

A. I haven't the slightest idea.

Q. Then what did Mr. Taylor tell him to do?

A. To call the Valley Lumber Company and see where they wanted it delivered.

Q. How did Mr. Taylor know he was to call Valley Lumber Company?

A. I don't know that.

Mr. Archer: We have got more Psychics around here today——

Mr. Holt: Psycotic is the word you are groping for.

The Court: Proceed.

By Mr. Archer:

Q. In any event Mr. Taylor told this man to call the [fol. 368] Valley Lumber Company to find out where to take the load, is that right?

A. That is right.

Q. And the man, you said, had just come out of the telephone booth?

A. Yes.

Q. You saw him come out of the telephone booth and then Mr. Taylor suggested, or, rather, at Mr. Taylor's suggestion he went back into the telephone booth to find out where to take this load?

Mr. Whelan: That is objected to on the grounds it is assuming facts not in evidence and argumentative; already covered about twice.

The Court: Overruled.

A. I didn't know who the guy was calling. I didn't ask him and he didn't tell me.

Q. My question was you saw him come out of the telephone booth and go back to his load?

A. He walked over to the car, did not go back to his load.

Q. Then you got out of your car?

A. That is right.

Q. That is when the conversation took place and Mr. Taylor said for him to call the lumber company to find out where to take the load?

A. That is right.

[fol. 369] Q. You have no idea why he didn't know where to take his load?

A. No.

Q. You say there was no picketing at Pine Tree Lumber Company during this time that you are describing?

A. Not that I know anything about.

Q. Did you follow any of their trucks?

A. No, sir.

Q. There was no picketing going on at Escondido Lumber?

A. Not that I know about.

Q. You didn't follow any of their trucks?

A. No.

Q. You didn't talk to any drivers making any deliveries to those two yards?

A. Would you repeat that?

Q. You didn't talk to the drivers of any trucks making deliveries into those yards?

A. To the Valley Lumber Company, or the Escondido?

Q. To Escondido or Pine Tree?

A. I talked to truck drivers wherever I see them. I may

have talked to some of the drivers that were going to these two other yards. I don't know.

Q. You didn't ask any of these other drivers that might have been taking loads to Pine Tree or Escondido to call and find out where they were to go, did you?

[fol. 370] A. No, I did not.

Q. That only occurred with this truck from Fontana, is that right?

A. That is the only one I know about, yes.

Q. He is the only one who you encountered in this activity up *that* that didn't know where his load was to go?

A. That is right. He had "Fontana" written on his mud flaps, on the back of the truck and I took it for granted that was where he was from. I didn't know him so I stopped and talked to him to find out where he was from.

Q. Then he said, "I would hate to go back to Los Angeles", is that it?

A. That is what he said.

Mr. Archer: That is all.

Mr. Whelan: That is all, Mr. Aust.

The Court: That is all.

Mr. Holt: We are about through, your Honor, if you will just give us a few moments, please.

The Court: If it will help you any, I will take a recess.

Mr. Holt: I think we could take the recess.

The Court: We will take a ten-minute recess.

(Recess.)

Mr. Whelan: The defendants rest, your Honor.

The Court: Very well. Any rebuttal?

Mr. Archer: Yes, just about two minutes. Will you take [fol. 371] the stand, Mr. Garmon?

WILLIAM A. GARMON, one of the Plaintiffs herein, recalled as a witness for and in his own behalf, and having been previously duly sworn, resumes the stand and testifies further as follows:

Direct examination.

By Mr. Archer:

Q. Pull that up a little closer to you. Prior to your last meeting with the union representatives did any of them ever state to you, Mr. Garmon, they would only have a contract with your company if they first signed up all the men?

Mr. Whelan: That is objected to as improper rebuttal, already covered in the case-in-chief.

The Court: Overruled.

A. Yes.

By Mr. Archer:

Q. When was the first time they ever told you that?

A. The first time they ever mentioned that was the time that Mr. Collins and Mr. Taylor and another gentleman interviewed our employees and when they came back from the yard they told me that, or when they came back in my office.

Q. Before that they had never——

A. Never mentioned it.

Q. Never mentioned that in your prior conversations?

[fol. 372] A. No.

Q. Does Valley Lumber Company own a Chevrolet panel truck?

A. No, sir.

Mr. Archer: That is all.

Mr. Holt: I would like the first question and answer read back.

The Court: Read it back.

Mr. Holt: If your Honor would let me have it.

(The record read by the reporter.)

Mr. Holt: That is all. No questions from me.

The Court: You may step down.

Mr. Archer: Plaintiffs rest, your Honor.

The Court: Very well, you may argue. The reporter won't have to take the argument, will he?

Mr. Archer: No.

(Argument by Counsel.)

(Recess.)

(Argument by Counsel.)

COURT'S DECISION

The Court: I want to say at the outset, Gentlemen, I know of an old practitioner here in San Diego who at one time cautioned his son when he went on the bench in this county, he said, "When you decide a case never give any reasons for it, whatever you decide. One side or the other will haggle with you and make you look ridiculous", and from last reports I understand the son has always said, [fol. 373] "Judgment for the Plaintiff", or "Judgment for the Defendant". When I used to go down there I was never very well satisfied, because sometimes I was stunned with the decision he made, without giving any reason for it. So I will give you my reasons here, as inept as they may be and as unlearned as some people may think they are.

I will say this before I tell you what I am going to do. This is the third labor case I have had in my Department since about April of last year. I decided the other two and notice of appeal was promptly given and from that time on, as far as I am concerned, it is the unknown soldier, or something. I don't know what happened to it. I haven't received an opening brief or a closing brief; there hasn't been any decision and I am sure the Court won't determine it without briefs, and I don't know who is responsible for the delay. It is up to the appellant to file the opening brief, and if he doesn't do it within the requisite period of time, I think it is up to the respondent to make a motion to dismiss the appeal. So I am speaking to counsel on both sides in this case; Mr. Whelan in one case and Mr. Archer in both of them, and probably if you gentlemen would have hurried up with those cases and got them decided, I would have been better informed, if not more learned, on the point in question than I am today. But the cases are pending up in the

District Court of Appeal without any briefs of anything, [fol. 374] and certainly you are not going to educate me on what the law is in that manner.

I think all of these cases, coming down from the United States Supreme Court interpreting rulings from other jurisdictions sound very well. The Virginia case which has been cited—of course, there was a so-called "right to work" statute, and in the Washington cases, the Supreme Court of the State of Washington had laid down a certain policy by deciding the case in that State.

In the Gibony case in Missouri they had a statute "in restraint of trade" and I understand all those cases when I hear them and read them. I try to keep up with them.

But I am not so well informed as to what the law is in the State of California. I can tell you what it is in other states, but not so well as to what it is in California, and from what I see coming down from the Appellate Courts of this state, I think that other people are somewhat confused on the same point.

Sometimes I am amazed at the decisions made by the trial courts here, either for or against the union, and sometimes I am amazed at what the Appellate Court or the Supreme Court does when the case gets up there. Everyone seems to have a little different angle.

Now we have these earlier cases, and so forth, and we have these more recent cases, and I think the attitude of the Supreme Court of the United States in these labor cases has changed to a considerable extent, and I think the [fol. 375] attitude of the Supreme Court of this State has changed to a considerable extent, not by legislation, but by what the Supreme Court of the United States has told them in the cases that went up from this state, and the construing of the statutes in cases arising in other jurisdictions.

Now on this particular point involved here Mr. Archer has said repeatedly it is like the Benton case. One phase is like the Benton case, that is, one cause of action. In the Benton case I was quite impressed with the one cause of action which sort of carried the other one with it, in that the Benton Company had a contract which was in full force and effect, as far as the Roofers were concerned, and the

Teamsters put a picket out there and the Roofers walked off. Even with a picket out there the Roofers could have kept on working and completing their jobs by reporting to the various jobs without crossing the picket line. I was quite impressed with that. One cause of action sort of carried the other along with it. I thought I was right on both of them, but the last I heard of that case was what I said about it in this Department. I am not conceited enough to feel real certain I am absolutely right.

Everytime I try these cases we get into the same difficulty. Somebody files a petition with the National Labor Relations Board and they turn it down and then we have the objection that I have no jurisdiction and the National Labor Relations Board has, and I have been trying to feel [fol. 376] my way along here in this case and I did get some comfort from that Circuit Court of Appeals decision in that Dutch Bakery case up in Los Angeles in which Judge Pope seemed to raise the point that in that case the National Labor Relations Board granted a hearing. He wasn't so certain, either, what that court would do in the event they ever got a case where a petition wasn't granted by the National Labor Relations Board, and that is exactly where we are at the present time.

The petition was filed and a hearing was denied. I have looked at these papers here and we talk about small business and we have these Congressional Committees, which their constituents think are going to protect small businesses, and I consider this lumber yard in Escondido would certainly be in the category of a small business, and yet we have these federal agencies and when these small businesses file a petition with them to get relief in a certain case in which I think they would be entitled to relief, and some examiner up there perfunctorily turns the petition down and says that if you are not satisfied with the decision, you can appeal it to Washington, D. C., and by the time you get there, with all the matters pending back there, everybody would be dead and gone by the time they ever found the file.

So I will be frank in telling you that in deciding this case I don't feel I am just one hundred per cent right. I am treading on thin ice, like I did back in Iowa and Colorado. As Mr. Holt mentioned, I never know when the ice

[fol. 377] is going to give way under me. But in this case the petition was filed and I think the application was justified, and, as I have said, they were turned down by this examiner and he tells them they can apply to Washington if they are not satisfied. I should probably say in this case that you can always take it up to the Appellate Court, but I know you don't need that encouragement, because I know that is where it will go.

In any event, I think the petition was proper and personally, I think it should have been granted. Then you gentlemen started talking about the labor policy as laid down in this state by the Supreme Court and by the Legislature. We have very little laid down by the Legislature, and almost as little by the Supreme Court, but I think that as far as the federal law is concerned, even though the Labor Relations Board in this case turned down the petitioner, I think that since they were entitled to some redress under the petition, I don't think that you can ignore the rights of the employer here under the federal statute. I don't think we can say, "Well, sure, the federal law which applies in this state, and which should have been applied, says so and so, but some examiner in Los Angeles turned it down, so we will just brush aside the federal law and say that doesn't apply, and that these people here, these employers, and so forth, are orphans and they are not entitled to any protection."

[fol. 378] I think that, irrespective of whether they were turned down, if they were entitled to any benefits under the Act, that their rights ought to be protected. And under the National Labor Relations Act, which is only common sense and only horse sense, that if you want somebody to join the union and you have a group of employees that don't belong and the employer says, "I have no objection to my employees joining the union and letting you be their bargaining agent, if you get their consent", that is only horse sense. That is the only thing a person should do.

Now there has been lots pro and con here about the attitude of the Garmons. One of the Garmons, I understand, doesn't like the unions and the others haven't expressed themselves to any particular extent. I am not going to try anybody for his thoughts in this case. If one Mr. Garmon

doesn't like unions, I think I know what the union officials think of him, and they have a right to their thoughts just as much as he has. Now as long as neither of the Garmons here went to these employees and said, "Now we don't want you to join the union", I don't think they have violated any law. I think they have a right to tell them, "You go ahead and do as you want. If you want to have the union represent you, you can do so." One said, "I am not in favor of the unions, but you can go ahead and join", but I don't think they have done anything wrong and yet the only person that is actually suffering from the picketing [fol. 379] out at the place is the Garmons, the employers, whom the unions have told "We don't want your signature to this agreement until we get your employees to sign up. After the majority sign up we will get you to sign it". But in the meantime, the only one suffering from it is the employer; the employees are working and getting their salaries, and getting more than they did before, and they are not suffering a bit. It is the employer that is suffering from what the employees won't do. I don't think the employers have a right to tell the employees out there, "You go sign up with the union as your bargaining agent or we will fire you". I don't think they have a right to do that. Now if there is any question about what transpired out there between the Garmons and their employees, there has been a lot of testimony introduced, but there have only been two employees brought in here. One was the foreman and one the gentleman sitting back there now. I think there are about six or seven others. If the unions thought that the Garmons had coerced the employees not to sign up with the union, there is a good way to prove that under Section 2055 of the Code of Civil Procedure, as amended in 1951. That is the examination of an adverse party. It says:

"A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, member, agent, employee, or managing agent of any such party or person, or the agent, [fol. 380] officer or employee of a municipal corporation which is a party to the action or proceeding, may be examined by the adverse party as if under cross-examination,

subject to the rules applicable to the examination of other witnesses."

Now certainly the employees of the Valley Lumber Company would come under that section as amended in 1951, and if there is any question as to whether or not the employers coerced these employees into not designating the union as their bargaining agent, they could have been brought in and examined under oath, and I would have made them answer and I would have made them answer truthfully, as far as I could.

But none of these employees have been brought in, and therefore I must assume that they weren't coerced. The Garmons denied it and they said it was entirely up to the employees. That is the state of the record, so I am going to have to find that the Garmons had nothing to do with the employees out there in the way of holding them back as far as the designating of this union as their representative. If I thought for one minute that the Garmons had put on the pressure and coerced them or urged them not to sign up with the union, if they were willing so to do, I would let them sit right where they were, because I don't *they* they have a right to do that.

Now under this contract, if the employer had signed it and [fol. 381] he wasn't asked to sign it, if he had signed it and abided by it, why he would have had to discharge his employees and he would be thereby coercing his employees either to have these unions represent them as a bargaining agent, and if they didn't do it, why he would fire them, and I don't think he has any right to do that. I think that the only way this picketing could be stopped out there without an injunction is for the employees either to voluntarily come in and sign up, and then have the employer sign the agreement, or have the employer sign the agreement with the union and fire the employees; and if they signed the agreement and fired the employees I think they would be doing an illegal act and I am not going to allow them to do that.

I think the proper procedure for the union would have been to cooperate in getting the National Labor Relations Board to get somebody down here to determine whether these employees wanted the unions in question to represent

them and if they didn't get the employees, forget about it until such time as they could work on them a little bit longer and see if they couldn't persuade them to change their minds at some future date. I think putting the pickets out there at the present time is in violation of the law. I will admit that under ordinary circumstances you can go out and picket a place and there is nothing that can be done about it as long as you picket peacefully, but I think this picketing [fol. 382] here is for the purpose of coercing people to violate the law and I think it is illegal.

We have had a lot of testimony about these union individuals being out there at the place. Unless people that were doing business with the yard were to be scared away, or discouraged, and so forth, I don't think there would be any necessity for these union cars to be sitting out there in these instances. I think the purpose was to discourage people from coming in there. It has been denied they were there for that purpose, but in this one instance the testimony shows, I think, they followed a truck for 25 miles and one of the Garmon cars went, besides the truck, and when they saw them they ceased following the truck. They said they were going out to see where it was going, but I don't know what changed their minds. They didn't find out the destination of the truck, and if I were a union official I wouldn't go 25 miles to see where a truck was going and just before I found out, I would turn back. I think they saw the Garmon boys out there in their car and just figured they didn't want to go any further with it.

I wish the law in this state were more settled when you have the National Labor Relations Board involved, which won't take jurisdiction; and as far as the established policy in the State of California is concerned, I don't think we can ignore the federal law and just say they have no right to the protection of the state, even if the Labor Board won't take [fol. 383] jurisdiction when they have a right to, and I think for the employer to have signed this agreement coercing the employees to submit to being represented by the unions would have been an illegal act and I will therefore have to grant the injunction.

Now, Gentlemen, I hope that you hurry up and speed up these decisions you have pending, and so forth, so that in

the future any further actions arising involving this point, that the other Judges and I may be more fully advised. I don't care how they go up there, but I do want them to be decided. I think it is unfair to everybody to take an appeal in these cases and let it lay. It isn't fair to anyone.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Whelan: May I ask your Honor a question?

The Court: Yes.

Mr. Whelan: In this case of In re DeSilva, 33 California 2nd, at page 77——

Mr. Holt: Would your Honor and you Gentlemen excuse me. I am very late and the decision has been made. I don't want to appear to be discourteous, but——

The Court: Surely.

Mr. Whelan: On page 77 it says:

"Following the filing of an amended complaint to include allegations of the denial of the plaintiffs' petition to the National Labor Relations Board for certification of a union representative——"

[fol. 384] That is what was done in this case, and in the DeSilva case it says:

"The plaintiffs' petition to the National Labor Relations Board for certification of a union representative was denied" and then the injunction was violated and then a petition for a writ of habeas corpus was filed and the Supreme Court held that a State Court has no jurisdiction, at the suit of a private employer, to enjoin unfair labor practices affecting interstate commerce which are subject to the provisions of the Act, and the exclusive jurisdiction of the National Labor Relations Board over such matters is not divested by the Board's denial of the employer's petition for certification of a union representative, nor by the absence of reports and affidavits required by the Act. The Supreme Court granted the writ of habeas corpus and said the Court was without jurisdiction to issue an injunction. Did your Honor have this case? I didn't read it to you because I read it in the former trial and I thought your Honor had it in mind.

The Court: Yes. These habeas corpus cases, I don't know

—I have always been leery of them. They are filed on a criminal case and the only thing the court can say is "Yes, the man is in jail, and I don't think he was given due consideration of his civil rights". There is so much poor law—you grant the thing and that is the end of it. But I told you what I think about it, and if I am wrong, that is too bad. If you Gentlemen will hurry up and get these cases [fol. 385] decided on appeal, and if I happen to be wrong, then I will follow it as decided in these appeals.

Mr. Whelan: If your Honor please, in the Benton case, in which I am counsel for the defendant, or one of the defendant unions, the transcript was up to the Appellate Court, I think, about April 22nd, and because of the press of other business I got an extension until July 1st to file the appellant's opening brief. We are not discarding the appeal, but intend to go ahead with it.

Mr. Archer: I have made a note in red pencil, your Honor, in quite large handwriting here "Letters to attorneys re briefs on appeal". We have been granting extensions of time, and in view of your Honor's severe admonition, or somewhat severe admonition, I will write a letter saying that the sand is about running out in the hour-glass.

Mr. Whelan: I have had but the one extension. I won't have a second. I will get the briefs on file.

Mr. Archer: Your Honor, will you rule on the damage?

The Court: Oh, as far as the damages are concerned, Mr. Archer, I looked at your figures here which you gave me and here in March, 1951, you have roughly 40,000; in April the same year you have 32,000, and in May you have 28,000. Then we go over to 1952 and you have 38,000 in March, 39,000 in April and 37,000 in May. That is pretty steady. Then you come over here to 1953 and you have 44,000 in March and 46,000 in April and 41,000 in May. These figures, [fol. 386] they fluctuate without any rhyme or reason, and I can't make any accurate head or tail out of anything that is in there. Somebody testified he got two $4,000 jobs. Well, somebody suggested that he didn't know whether he would have or not. If we had had the men in here to testify that if they hadn't had the picket out there that he would have given the Valley people that job, I would have put some credence in it. Lots of times a lawyer thinks he is going to

get an estate and it goes to some other lawyer and he can't figure out why.

Mr. Archer: The man that testified is the man who is building the building.

The Court: Is that the man?

Mr. Archer: Yes. Mr. Bailey is the builder, not the contractor. He had been a customer of theirs and he said he would have been a customer on this new job, in fact, I asked him: "Did you intend to buy materials for this new job from Valley Lumber?" And he said he did. Then he was unable——

The Court: I had forgotten about him. I thought he was a representative from another lumber company.

Mr. Archer: No. Mr. Wyland from the Pine Tree Lumber Company said that an Angold, a builder, had been a customer at all times, to his knowledge, of Valley Lumber Company. Since this trouble had come along Angold came to the Pine Tree Lumber Company and Angold is now buying $4,000 worth of material from Pine Tree. Mr. Bailey, [fol. 387] who is the builder-owner, said he had built a job last year and bought all his materials from Valley; he was starting another project now and would have bought from Valley except his contractor cannot, and I asked specifically whether he intended to buy his materials from Valley and he said yes, he had. I asked him how much he anticipated buying and he said $4,000. So there was these two.

The Court: I guess I listened to Mr. Whelan too closely. I heard Mr. Whelan make the remark "We have no assurance here they would have gotten the business in the first place".

Mr. Whelan: I don't think we do have and the pattern each year is about the same for March, April and May, and each year it decreased in May over what it had been in April.

Mr. Archer: But never $5,000.

Mr. Whelan: $4,000, I think, in one year.

Mr. Archer: No——

Mr. Whelan: Now when there is a picket line on, lots of people who don't like labor unions make it their own business to go in and deliberately buy from the place being picketed instead of from a place that isn't picketed and I think this question of damages is so speculative in this case that none should be awarded.

The Court: I don't agree with you about people going in and trading that way.

Mr. Whelan: But people do that. Friends of mine say, [fol. 388] "I have gone in there simply because I didn't like the idea of that picket being outside the door".

The Court: I think he was shooting off his big face and didn't know what he was talking about.

Mr. Archer: I am inclined to agree.

The Court: I don't know of anybody that deliberately crosses a picket line. If he is going in anyway, he might, but he wouldn't go through it deliberately. I had forgotten about this fellow being——

Mr. Archer: He was a clothing merchant.

The Court: I remember now.

Mr. Archer: He built what was new to me. I said "apartment" and he said a "triplex".

The Court: Instead of a duplex.

Mr. Archer: And I asked him if he was a customer of Valley and he said yes. I said, "On the new job?" And he said, "No." I said, "Had you intended to buy there?" And he said, "I did." I asked him how much and he said $4,000.

The Court: I remember it now. I paid too much attention to Whelan's argument.

Mr. Archer: Then there is the two items of extra man-hours. They are small——

The Court: No, I am going to allow you the thousand dollars and I am going to allow it on the 25% basis on the theory you had the same overhead.

Mr. Archer: All right.

[fol. 389] The Court: So I will allow you a thousand dollars damages. I thought it was just these gentlemen saying they would have gotten the jobs. I had forgotten about Bailey coming in.

Mr. Archer: Oh, no.

The Court: So I will allow you a thousand dollars. That is all I will allow you.

Mr. Archer: We will accept that graciously.

Mr. Whelan: When you get it you will accept it.

Mr. Archer: We will accept the judgment graciously. I think you are leaving tomorrow to be gone for two weeks?

The Court: I am leaving Tuesday. I won't be down Monday.

Mr. Archer: I see. Now can we have a new temporary injunction pending your return and the settlement of the findings of fact and the final judgment?

The Court: You may, yes.

Mr. Whelan: What kind of injunction: Is it going to be an injunction against all types of picketing for all purposes?

The Court: Yes, pending the signing of the findings of fact and conclusions of law and the final judgment.

Mr. Archer: What is your schedule tomorrow?

The Court: I will be in the Probate Department and I will be here until five o'clock.

Mr. Archer: Mr. Whelan, do you want to plan to meet [fol. 390] us here, say between four and five—I will check with you as to the exact time on the telephone—to present the order?

Mr. Whelan: All right. I will be available. Here is one thing; it is so late tonight that that picket will be there tomorrow morning. We can't get word to him until about ten o'clock.

Mr. Archer: You could call the Valley Lumber Company and I am sure they will be glad to call the picket in and let him talk to you on the phone.

The Court: Let's not quibble about a few hours.

Mr. Whelan: We will get him off tomorrow without fail.

(Court was adjourned at 8:35 P. M.)

[fol. 391] Reporter's Certificate to foregoing transcript omitted in printing.

Office - Supreme Court, U. S.
FILED
MAR 29 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 285 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners.

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

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No. .....

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners.

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of California entered on December 2, 1955.

Citations and Opinions Below.

The memorandum of opinion of the Superior Court of San Diego County of the State of California, a court of general jurisdiction, dated June 4, 1953, is unreported and is printed in Appendix "A" hereto, *infra,* page 1. The Judgment of the Superior Court dated July 31, 1953, is printed in Appendix "B" hereto, *infra,* page 8. The opinion of the Fourth District Court of Appeal of the State of California, printed in Appendix "C" hereto, *infra,* page 10, is unreported but found in 127 A. C. A. 2d 320. The opinion of the Supreme Court of the State of California printed in Appendix "D" hereto, *infra,* page 26 is reported in 45 A. C. 683.

Jurisdiction.

The Judgment of the Supreme Court of the State of California was entered on December 2, 1955. Appendix, page 26, *infra*. A timely Petition for Rehearing was filed and denied on December 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1257.

Statute Involved.

The Statutory provisions involved are the Taft-Hartley Act (Labor Management Relations Act, 1947, 29 U. S. C. 141 *et seq.*)

Questions Presented.

The conclusions of the Supreme Court of California pose the following questions:

1. May a state court under the Act, enjoin peaceful picketing of an interstate employer in a case where the Board has declined to exercise jurisdiction, when it could not do so if the Board had not so declined?

2. If the answer to (1) is in the affirmative, may a state court do so on grounds the picketing though lawful under State law is an unfair labor practice under the Act?

3. If the answers to (1) and (2) are in the affirmative, may a state court do so where the alleged unfair labor practice consists of picketing for a union shop by a union not "designated" by the Board when the Board has declined to hold a representation election and the State of California has no procedure for doing so?

4. If the answers to (1), (2) and (3) are in the affirmative, does refusal by the Board's Regional Director to institute representation proceedings, without any attempt to review such refusal, vest the State Court with jurisdiction in an unfair labor practice case?

Statement of the Case.

Plaintiffs are engaged in the business of selling lumber and building materials as partners under the name of Valley Lumber Company. Defendants are the San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36. About November 15, 1952 the Unions requested a labor agreement with Plaintiffs under one of the terms of which certain employees were required to make application for membership in the unions within thirty days (30) after hiring.

The company refused to sign the agreement on the ground it would be a violation of the Act so to do before its employees or an appropriate unit thereof designated a union as their collective bargaining agent. Thereafter, the unions commenced peaceful picketing at the company's place of business. The picket carried a banner of moderate size upon which appeared the following: "A. F. of L. Picket Millmen's Union 2020, Teamsters' Union 36 invites employees to join."

Plaintiffs brought an action on May 7, 1953 in the Superior Court of San Diego, California, a court of general jurisdiction, to enjoin defendants from picketing their place of business and for damages. They alleged they were in interstate commerce, and that the contract requested of them would violate the Taft-Hartley Act since none of the unions had been certified by the Board.

Defendants by way of both Demurrer and Answer raised the question that the Superior Court had no jurisdiction since their activities, if illegal at all, were within the exclusive jurisdicton of the Board. Defendants, further, by way of Answer, raised the issue that plaintiffs failed to exhaust their remedies under the Act.

On the same day (May 7, 1953), Plaintiffs forwarded to the Regional Director of the Board a letter and Petition requesting the Board to determine the appropriate unit for voting and to hold the representation election. This the Regional Director refused to do. Plaintiffs did not appeal from this refusal. Plaintiff filed no unfair labor practices with the Board, their attorney testifying that: "We were doubtful that any labor practice by the unions was being committed in so far as the picketing of the plant of the plaintiff in this case was concerned." [R. T. p. 215.]

The Trial Court found that company operations affected interstate commerce in that it sold over $250,000.00 worth of materials originating and manufactured out of California; that the purpose of the picketing was to force execution of the foregoing labor agreement, and that the Board refused to accept jurisdiction for the purpose of a representation election. It applied the Taft-Hartley Act, awarded plaintiffs damages, and enjoined defendants from picketing and engaging in various other activities in order to require plaintiffs to discriminate wth respect to conditions of employment by reason of membership or lack thereof in the unions, until one or more of the unions had been designated by the Board. Since the State of California has no administrative procedure for union designation, the Trial Court in effect forbade picketing until such time as the Board would assume jurisdiction, determine the appropriate unit, order the election and certify the results thereof.

The unions appealed to the District Court of Appeal, 4th District, of the State of California, contending in substance that the Superior Court had no jurisdiction to enjoin activities contended to be an unfair labor practice under the Act; that the unions' requested contract and their conduct was entirely lawful and proper under California law, and that the Garmons had failed to exhaust their remedies before the Board.

The Appellate Court in a unanimous opinion on August 25, 1954 (127 A. C. A. 2d 320) Appendix "C," reversed the Trial Court holding in substance that while the claimed objectionable conduct of the unions was defined in the Act as an unfair labor practice, there was no state statute making it unlawful and therefore the State Court had no jurisdiction. The Court relied on *Garner v. Teamsters, Chauffeurs & Helpers Local 776,* 74 S. Ct. 161. The Appellate Court further concluded that since the Board had jurisdiction to determine plaintiffs' right to injunctive relief, the state court as such, was without jurisdiction until plaintiffs exhausted their administrative remedy.

The Garmons thereupon appealed to the Supreme Court of the State of California.

The Supreme Court of California on December 2, 1955 (45 A. C. 683), rendered a four to three decision holding in substance that where the Board declines to exercise its jurisdiction because of its jurisdictional yardsticks, such action amounts to a declaration that national

labor policy will not be jeopardized if a State Court assumes jurisdiction and enforces the Act. The majority reasoned that otherwise Congress would be denying a remedy to employers over whom the Board declines to exercise jurisdiction. Consequently, Congress intended to give state courts jurisdiction to enforce the Act in such circumstances.

The strong dissent held the foregoing reasoning to be fallacious because:

> "(1) The National Labor Board and the powers granted to it are an integral part of the federal law and that law is not intended to have application in a situation where the board plays no part; it is inescapable that the federal law is to be administered by the board, not by the state courts. (2) The board in refusing jurisdiction as it has power to do, has in effect determined that the federal law should not apply in this case. (3) It is neither feasible nor fair to apply the federal law. (4) There has not been such a refusal to exercise jurisdiction by the board here as to justify the conclusion that the state court has jurisdiction."

Reasons for Granting the Petition.

1. None of the questions presented in this case have been expressly decided by this Court. On the contrary, in at least three cases this court left undecided the precise questions involved here. (*Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U. S. 767, 776; *Garner v. Teamsters, Chauffeurs, etc.,* 346 U. S.

485, 488; *Building Trades Council v. Kinard Construction Co.,* 346 U. S. 933.) In the latter case, the Alabama Supreme Court had held a state court had jurisdiction to enjoin picketing of an interstate employer on the ground it constituted an unfair labor practice under the Act, where the employer alleged his interstate business volume fell short of the Board's jurisdictional standards. This court reversed, citing its opinion in *Garner, supra,* and stating:

> "Since there has been no clear showing that Respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the State court could grant its own relief should the Board decline to exercise its jurisdiction."

2 The instant decision conflicts in principle with a decision of the 10th Circuit Court of Appeals in *Retail Clerks Local No. 1564 v. Your Food Stores,* 225 F. 2d 659 (Aug. 4, 1955). There, an interstate employer originally sought a state court injunction against picketing on the same grounds as in this case and on the theory of trespass. On removal to the Federal District Court for the District of New Mexico, the case was dismissed in reliance upon this court's decision in *Garner v. Teamsters,* 121 Fed. Supp. 339. Subsequently, the Regional Director of the Board advised the parties that the store did not meet its revised 1954 jurisdictional yardsticks. The employer then filed a new action in the state

court on trespass theory, claiming, *inter alia,* that the first decision was not *res adjudicata* because the Board's action revested the state court with jurisdiction. On removal, this argument was upheld by the Federal District Court, 124 Fed. Supp. 697, but the 10th Circuit Court of Appeals reversed, saying:

> "Moreover, the refusal by the National Labor Retions Board to entertain the instant grievance on its merits did not of itself alter the pertinent law thereby revesting the state court with authority to proceed. Amended Section 10(a) of the Act specifically provides what this court deems to be the only way state authorities can be vested with authority . . . within the exclusive purview of the Act. Unless and until there is an express ceding of jurisdiction to a proper state agency, exclusive jurisdiction remains in the federal agency. For the sake of order such must be true. Otherwise an interminable problem of determining jurisdictions would exist, throwing needless confusion into an area clearly pre-empted by Congress."

The instant decision is likewise in conflict with a decision of the New York Supreme Court, Appellate Division, in *New York State Labor Relations Board v. Waggs Transportation System,* 130 N. Y. S. 2d 731, 33 L. R. R. M. 2855 (March 25, 1954), holding that even if the Board should refuse jurisdiction over an interstate employer, the State Board would have no jurisdiction of unfair labor practice charges against him under the State

Act; and with a decision of a Michigan Court of Appeals in *Universal Car Co. v. Association of Machinists,* 35 L. R. R. M. 2087 (Nov. 1, 1954), holding that refusal of the Board to assert jurisdiction in the representation issue does not empower the state court to enjoin picketing allegedly in violation of both State and Federal statutes.

3. That these questions are of utmost importance to the practicing bar and to the economy of the country probably needs no proof. The volume of litigation and legal writing they have engendered (see Appendix E) stands as a monument to the confusion which exists among lawyers and litigants, and will exist until this court puts it to rest.

This confusion is not merely academic; the questions have enormous practical consequences for labor relations in interstate commerce.

It is difficult, however, to discuss these consequences apart from petitioner's belief that the decision of the court below is erroneous and probably in conflict with principles stated by this court. In order to avoid needless repetition, therefore, we shall discuss these topics together:

(a) In recent cases, this Court has emphasized the preemptive character of Federal labor legislation, *Garner v. Teamsters, Chauffeurs, etc. supra; Building Trades Council v. Kinard Construction Co., supra.* The primary reason asserted in favor of preemption in those decisions

was the evidenced Congressional desire for uniformity throughout the area of interstate commerce. We submit that widespread adoption of the theory below would destroy this uniformity by creating two federal labor laws, differing both in substance and procedure: one administered by the Board, in those industries in which it chooses to exercise jurisdiction, the other by state courts where the Board declines to do so.

This conflict is illustrated by the facts of this case. Here a union picketed for the purpose of inducing the employer to agree to a union shop. Because it had not been "designated" by the National Board as bargaining representative for that shop, it was found to have committed an unfair labor practice under the Act. The court issued this injunction on the ground that the Board had declined to act in a representation case involving the same employer; but *this same declination of jurisdiction renders impossible the very thing the court insists upon to legalize the picketing.* Even assuming designation by a state agency would satisfy the court (*cf. Fur Workers Union Local 72 v. Fur Workers Union No. 21238* (C. A. D. C., 1939) 1 Labor Cases 18,324, 70 App. D. C. 122 App'd per (1939), 2 Labor Cases 17,066, 308 U. S. 522 *contra*), California has no such agency; unless the Board took jurisdiction, the union would have no way of achieving designation. Though purporting to apply the Federal Act, the state court is in effect applying it piecemeal and in a wholly discriminatory fashion. If its theory were

adopted by courts of other states which, like California, have no designation procedure, the effect would be, in the name of the Act, to outlaw all picketing for a union shop in that area of interstate commerce over which the Board declines jurisdiction. Legislation for interstate commerce would supply the rule when the Board assumed jurisdiction and another, quite contrary to the spirit of the Act, when it declined.

As this court said in the *Garner* case:

> "A multiplicity of tribunals and a diversity of procedure are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. *The same reasons which prohibit Federal Courts from intervening in such cases, except by way of review or an application of the Federal Board, precludes state courts from doing so.* (Omitting citations.)
>
> "And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the confidence of the Federal Board also excludes state courts from like action." l. c. 491.

Then, too, apart from procedure a state court does not have the expertise in labor relations Congress felt necessary for dealing with such relations in interstate commerce. As stated in *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (14 Labor Cases 64,443):

> "A remedy in the courts not expressly given is not to be inferred, and especially is this true where

> Congress has worked out elaborate administrative machinery for dealing with the whole field of labor relationships . . . and has provided for the handling of unfair labor practices by an administrative agency equipped for the task."

(b) Through labor legislation, Congress sought to achieve certain affirmative policies in interstate commerce independently of Board action. Therefore, even though there may be no conflict with Board decisions where the Board declines to act, there is a very definite and extremely important conflict with the policies of the statutes involved.

For example, Section 7 of the Act protects the right of employees and labor organizations, to picket peacefully for most purposes. These rights are not dependent upon action by the Board. They are protected against interference, not only by employers (which is the only type of interference the Board could remedy) but by state action as well. (*Hill v. Florida,* 325 U. S. 538.) They extend to all employees whom the power of Congress under the Commerce Clause could reach. (*Amalgamated Association v. Wisconsin Board,* 340 U. S. 383, 391.) This was made clear in the *Garner* case, *supra;*

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained

by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

* * * * * * * *

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded." l. c. 499.

There is a serious question in this case of denial of federally protected rights. The Act continues to protect picketing for a union shop, but qualifies this protection by insistence on Board certification. Where the Board declines to assert jurisdiction, that certification is impossible. Petitioner contends that in such cases the picketing remains protected in spite of lack of certification, at least where a State has no certification procedure.

Another affirmative policy of the federal legislation challenged by the decision below is that aimed at eliminating the use of the *ex parte* injunction by private parties in interstate commerce. The background of the Act indi-

cates that dissatisfaction with this method of dealing with labor management disputes by state courts was one factor behind federal policy. The Board is required to use a procedure quite different from that used by state courts in labor cases. The "reversion" theory seizes upon declination of jurisdiction by the Board as a ground for utilizing this same legislation to reinstitute the labor injunction as a regulatory technique in interstate commerce.

Congressional policy against the labor injunction is in turn part of a larger policy against adversary proceedings in disputes involving interstate commerce.

The two principal features of the Act—the determination of employee representation and the prosecution and prevention of unfair labor practices are the responsibility of the Board, a quasi-judicial tribunal, and the General Counsel, a prosecuting officer. The Act gives the General Counsel final authority on the question of whether an unfair labor practice complaint should issue.

Analyzing the nature of a representation proceeding, the United States Court of Appeals, Third Circuit, has declared:

> "A certification proceeding is of a non-adversary, fact-finding character in which the Board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation. Section 9 (c) of the National Labor Relations Act [29 U. S. C. A. 159 (c)] confers a

wide discretion upon the Board as to the manner in which this investigation shall be made."

Southern Steamship Co. v. NLRB (C. C. A. 3d, 1941), 120 F. 2d 505.

Under the "reversion" theory, the Taft-Hartley Act would be turned into an instrument of aggressive litigation between union and management. The prosecutional function of the General Counsel could be arrogated by counsel for a private party in a State court—a result which Congress was presumably trying to avoid.

(c) In addition to destroying uniformity and conflicting with federal policy for labor relations in interstate commerce, the theory below, would create considerable uncertainty as to appropriate jurisdiction. As the court in the *Universal Car* case, *supra,* stated:

> "If the jurisdiction of the state courts is to depend —not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision."

(d) That such obstacles to uniformity, Congressional policy, and certainty of jurisdiction within interstate

commerce are contrary to the Act is evidenced by Section 10(a), (see Appendix E).

This section was amended in 1947 to meet doubts created by the decision of the majority of this court in the *Bethlehem* case, *supra,* as to whether the Board had the power to cede jurisdiction to the states. At that time, Congress was aware that at least three justices of this court were of the opinion that declination to exercise jurisdiction by the Board would not increase state jurisdiction, for Mr. Justice Frankfurter, joined by Mr. Justice Murphy and Mr. Justice Rutledge stated in a concurring opinion in the *Bethlehem* case:

> "I cannot join the Court's opinion because I read it to mean that it is beyond the power of the National Board to agree with State agencies enforcing laws like the Wagner Act to divide, with due regard to local interests, the domain over which Congress had given the National Board abstract discretion but which, practically, cannot be covered by it alone. If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations."

Yet the amended Section provides for only one method of a state obtaining jurisdiction over labor relations in interstate commerce; and this method insured that the problems of nonuniformity, conflict of policy, and uncer-

tainty of jurisdiction discussed above would not arise. As this court stated in *Amalgamated Association v. Wisconsin Board, supra:*

> "When it amended the Federal Act in 1947, Congress * * * was * * * well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board,* 1947, 330 U. S. 767, and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states."

In a footnote to this statement the Court, after citing Section 10(a) of the Act as amended by Taft-Hartley, said:

> "A proviso of 10(a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). See also minority views to the same report, *id.*, pt. 2, 38, agreeing as to this feature of the legislation."

The text then continues:

> "Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. H. R. Rep. No. 245, 80th Cong., 1st Sess. 44 (1947)." 340 U. S. 397, 398.

This implication is made even clearer by the fact that Congress has twice rejected amendments to the Federal Act designed to accomplish what the court below accomplished by judicial decision. (S. 1264, introduced by Senator Ives in 1st Sess., 83rd Cong., 99 Cong. Rec. 1846 (1953) and S. Rep. No. 1217, 83rd Cong., 2d Sess. 28 (1954).)

Petitioner submits that Congress decided it would rather have no regulation than non-uniform regulation conflicting with Congressional policy and posing interminable jurisdictional conflicts. This does not mean the area must be unregulated, or that either unions or employers must go without remedies. The Board may yet see fit to assert more fully the jurisdiction given it; and states like California may, if they desire to exercise control, enact statutes identical to the federal legislation, and reach jurisdictional agreements with the Board. The fact that neither of these things have as yet occurred should not be used to destroy Congressional intent, or to deprive parties of their rights under federal legislation.

4. Finally, petitioner contends that even if a state court may do what the California court has done where the Board declines to assert jurisdiction, the facts in this case do not constitute such a declination. Refusal by the Regional Director of the Board to hold an election in a representation case, even though accompanied by mention of the scope of plaintiff's business, may have been for a variety of reasons. Employer should have petitioned the Board to act on his unfair labor practice charges; or at the very least he should have appealed to the Board from the Regional Director's refusal to act in the representation case. Otherwise, the confusion engen-

dered by the "reversion" theory would be multiplied by erroneous assumptions as to the Board's willingness to act. The arguments on this point are so well set out by Judge Carter in his dissenting opinion, however, that petitioner does not feel he should burden the court with repeating them here.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER WENCKE,
JOHN C. STEVENSON,
CHARLES P. SCULLY,
MATHEW TOBRINER,
CHARLES HACKLER,
Counsel for Petitioners.

APPENDIX "A."

In the Superior Court of the State of California, in and for the County of San Diego.

Department No. 4. Before Hon. L. N. Turrentine, Judge.

J. S. Garmon, *et al.*, Plaintiffs, vs. San Diego Building Trades Council, *et al.*, Defendants. No. 180903.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiffs: Gray, Cary, Ames & Frye, By: James W. Archer.

For the Defendants: John T. Holt, C. E. Todd, and Thomas Whelan.

San Diego, California, Monday, May 18, 1953, 2:00 P. M.

The Court: Garmon against San Diego Building Trades Council.

Mr. Holt: Ready for the defendants.

Mr. Archer: Ready for the plaintiff, your Honor.

The Court: I stated in the beginning that I was going to reduce this to writing, but in preference to that, I will state my views in Court and if any of you want the transcript—which you needn't determine until I conclude—you can order it from the reporter. Probably those associated with Mr. Todd, at least, will want it.

The facts are relatively simple. The plaintiffs operate a lumber yard and are engaged in interstate commerce. They and their employees are unorganized in the sense that the employees do not have a bargaining agent of their own, nor have they designated any organized labor

unit to represent them, and, the employer has not recognized any bargaining agent of any type for the employees. Under that state of facts, two local unions, the defendants, went to the plaintiff employers and asked that a union contract be executed requiring that all of its employees be a member of one of the unions designated, or become such within thirty days after their employment and remain in good standing. The management or employers refused to sign such a contract, justifying their refusal on the grounds that the plaintiffs' employees were not members of any labor unions so far as they knew, were not required to be, at least, that they had not designated any union as a bargaining agent, nor had they designated a collective bargaining agent of their own to deal with the employer. The plaintiffs allege on information and belief that the employees do not desire to join or be represented by any of the defendants.

Thereupon, the defendants are charged with two separate acts. First, of the primary picketing of the plaintiffs' plant where the employees are employed, and secondly, of interference with and doing acts toward the patrons of plaintiffs such as material men, contractors and so on, which acts are ordinarily designated as a secondary boycott or secondary picketing, as distinguished from the primary picketing against the plant of the plaintiff itself.

As I understand it, neither the plaintiffs, the employers, nor any of the employees, nor any of the defendants, nor any other recognized union, has made any application to the National Labor Relations Board to have a representative appointed with whom they can deal as a collective bargaining agent representing the plaintiffs' employees. And, it is under these state of facts that the plaintiffs obtained a temporary restraining order and now seek a

temporary injunction restraining both primary picketing and secondary boycotting. The defendants claim that the Court has no jurisdiction, in that the exclusive jurisdiction vests in the National Labor Relations Board. Therefore, the State Courts have no jurisdiction whatsoever.

As I read the cases, I do not find that they are in complete accord, nor that I can arrive at any absolute decision supported by decisions directly in point by the Supreme Court of the United States or the Supreme Court of California. I have come to some conclusions in my own mind from the reading of these cases, and especially the Capital Service Case as amended May 12, 1953. I think that case is distinguished to this extent, that in that case, the plaintiffs had first invoked the jurisdiction of the National Labor Relations Board, and it had accepted jurisdiction of the case, and it was after the invoking of their jurisdiction and their acceptance of the same, that they went into the State Courts and sought to keep matters in statu quo until such time as the National Labor Relations Board had heard and determined the proceedings that plaintiffs themselves had initiated before the National Labor Relations Board. As I indicated previously in this case, none of the parties nor employees or other persons have sought the jurisdiction of the National Labor Relations Board.

It is hard for me to come to the conclusion that this so-called jurisdiction of the National Labor Relations Board is an absolute term, because first, they themselves may surrender, and secondly, they seem to have the power —at least they exercise the power—to reject an application made to them. They certainly have the power to delay it. And, if they have exclusive jurisdiction, that puts you in a state of doldrums that just isn't consistent with the reguar, orderly transaction of the business of the world

today. It puts you in a situation where if labor doesn't want them to act, they can hide behind that and do what they want to; where if management doesn't want them to act, they can hide behind that and take no action whatsoever. So, I think the real meaning of the law, and if there is any difference between the California Sommers case and allied cases and the Circuit Court decision, I would place more reliance on our Supreme Court decision than I would on the United States Circuit Court, because their decision is still subject to review by the United States Supreme Court, and until the United States Supreme Court has spoken, I would prefer to follow our Supreme Court.

It leads me to say this, that I believe that when no one interested, who could seek the jurisdiction of the National Labor Relations Board has done so, that if the acts are contrary to the law of the State, that the State Courts are not impotent to do anything, but have power to entertain litigation, that when the situation arises such as this, that when management can, that when employees can, that when organized labor unions can go to the Board, and refuse to do so or fail to do so, that then the State Courts are not powerless to handle unlawful acts which occur within their bounds. And, that is no hardship, because any one of the parties to this litigation, if they really sincerely believe that the National Labor Relations Board had the exclusive jurisdiction, could initiate or start proceedings on a moment's notice. So, I think that the State Court does have jurisdiction, for the reasons indicated.

Let me add this. I have no doubt that the National Labor Relations Board could affirmatively come in and take jurisdiction. So, it having failed to do that, no one else having asked it to do so, then, I think that this Court

has the jurisdiction to entertain this action. That resolves itself down to determining what acts of this case are lawful and what are unlawful. It is my belief that under the present law of the State of California and under the decisions of the United States Supreme Court, that when a business, an employer and employee are all unorganized and without the pale of organized labor in any manner, shape or form, and the employees have designated no bargaining agent of their own, that it is recognized fair practice for labor to exercise lawful economic sanctions in the manner of peaceful picketing, to try to get them to organize and become a part of labor. That is what is contemplated by the labor laws of America as they are established today. And, I don't think that the employees and the employer can sit back and say, "Well, somebody else has to get a collective bargaining agent. Somebody else has to get us a representative, and we won't do it ourselves. We will just rock here and nobody can do anything about it." So, as far as the picketing of the employer itself to the extent that it is done peacefully and lawfully, I think it is a perfectly lawful act of labor. The placard which they were displaying, as I remember it, was not out of line. I think the State Courts, of course, can control the manner of picketing, in that they must keep the peace and not make false representations, but I think the placard they displayed, if that is the extent of the primary picketing, they have the right to do so. If the numbers are kept within due bounds—usually, by practice, I presume, limited to not more than three at a time, operating singly and not together, so as not to block entrances, and are such as they are legitimately advertising that it is what they call unfair, I think it is perfectly lawful.

In regard to the secondary boycott, I think that is just as unlawful, and they have no right to do that under the law of California as it exists today.

So, the temporary injunction, so far as it follows the temporary restraining order, will be denied so far as primary peaceful picketing with placards in the same form as that introduced in court, is used, not more than three pickets to an entrance, they, not to bunch up so as to form a flying wedge, so to speak, and such as to give legitimate notice that a labor dispute is in existence, or that—when I use the term "labor dispute", you understand what I mean. I think they have the right to characterize it as unfair to labor, as that term has been interpreted by the courts, and no further. And, insofar as secondary boycotting is concerned, that should be restrained, be it direct or indirect. And, that will be the order of the Court. Will there be any bond requested on that feature of the case if I can get you to trial within ten or fifteen days, on the merits?

Mr. Whelan: I doubt that we need a bond, your Honor. If we did, it would only be nominal. So, I think we will waive the bond.

Mr. Holt: I think so, for my clients.

* * *

The Court: Well then, we will set it for trial on the merits on June 1st. You may have until Friday to file your answer.

Mr. Holt: We will have it by five o'clock Friday for sure.

The Court: All right. You can draw your order reciting that the bond was waived, also the motion to strike is denied.

Mr. Archer: Very well.

State of California, County of San Diego—ss.

I, John L. Stewart, an official reporter of the Superior Court of the State of California, in and for the County of San Diego, do hereby certify that as such reporter I reported in stenotypy the testimony adduced and the proceedings had at the trial of the above-entitled cause, and that the above and foregoing transcript, consisting of pages numbered from 1 to 7, inclusive, is a full, true and correct transcript of all of the testimony and evidence adduced and proceedings had at the trial of said cause.

Dated at San Diego, California, May 19, 1953.

John L. Stewart

Official Reporter.

APPENDIX "B."

Gray, Cary, Ames & Frye, 1410 Bank of America Bldg., San Diego 1, California, Telephone: Franklin 7323, Attorneys for Plaintiffs.

Filed Jul. 31, 1953. T. H. Sexton, Clerk; by L. M. Adams, Deputy.

In the Superior Court of the State of California, in and for the County of San Diego. No. 180903.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs, vs. San Diego Building Trades Council, Millmen's Union, Local #2020, Building Material and Dump Truck Drivers, Local #36, John Does I to X inclusive, Defendants.

Entered Jul. 31, 1953. Judgment Book 14, Pg. 25.

JUDGMENT

The above entitled case came on regularly for trial on the 1st day of June, 1953, before the Honorable John A. Hewicker, judge of the Superior Court, in Department One thereof, Gray, Cary, Ames, & Frye by James W. Archer appearing for plaintiffs and Thomas Whelan, John T. Holt and Todd & Todd by Clarence E. Todd appearing for defendants, and evidence having been introduced and said case having been fully tried, argued and submitted, and the court having been fully advised in the premises, and the court having made its Findings of Fact and Conclusions of Law, Now, Therefore, pursuant to the said Findings of Fact and Conclusions of Law;

It Is Ordered, Adjudged and Decreed that the defendants be, and they and each of them and their officers, members, agents, employees and all others acting on their behalf are hereby enjoined from picketing the places

of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, expressed or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof;

It Is Further Ordered, Adjudged and Decreed that the plaintiffs have and recover from the defendants and each of them, damages in the sum of One Thousand Dollars ($1000.00) together with their costs of suit herein incurred in the amount of $41.90.

Done in Open Court This 31 Day of July, 1953.

JOHN A. HEWICKER,
Judge of the Superior Court.

APPENDIX "C."

Opinion of the District Court of Appeal.

In the District Court of Appeal in and for the Fourth Appellate District, State of California.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs and Respondents, vs. San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Truck Drivers, Local 36, Defendants and Appellants. 4th Civil No. 4854.

Filed Aug. 25, 1954.

Appeal from a judgment of the Superior Court of San Diego County, John A. Hewicker, Judge. Reversed.

Todd and Todd; Thomas Whelan; and John T. Holt for appellants.

Gray, Cary, Ames & Frye; James W. Archer; and Ward W. Waddell, Jr. for respondents.

Plaintiffs, who are owners and proprietors as copartners of a lumber business operating under the name of Valley Lumber Company, brought this action on May 7, 1953, to enjoin defendants from picketing plaintiff's place of business and for damages.

On or about November 15, 1952, Morris Collins, secretary of defendant San Diego Building Trades Council, called at plaintiff's place of business in Escondido and requested plaintiffs to sign a union contract. The contract submitted required plaintiffs to employ union labor in that it required plaintiffs' employees to be or become and remain members in good standing of defendant unions. Plaintiffs refused to sign this agreement, stating that they had no request from their men so to do. There-

after Collins called on plaintiffs several times and was told that they were not ready to sign; that they did not know whether their employees wanted to become union members or not; and that Collins could discuss the matter with them.

Mr. Rutledge, plaintiffs' yard foreman, testified that on or about April 1, 1953, Mr. Garmon brought a union representative into the yard to talk to the men; the latter read the agreement to them and explained its provisions; the men discussed it and decided at that time to leave it up to plaintiffs as to whether they "wanted the union to enter." Subsequent to this meeting a second meeting was held at which no representative of the management or unions was present and at which the men definitely decided not to join the union. The plaintiffs had informed their employees that it was up to them to decide whether they wished to join the union. About the middle of April the company informed the union representatives of the decision of the men not to become union members. (Found in opinion of Appellate Court.)

Plaintiff William Garmon testified that after Collins talked with the men he stated they "were interested"; that a few days later he told Collins that as far as he knew, the men were perfectly satisfied and that he saw no advantage to plaintiffs in signing a contract; that the men had not requested such action; that some time in April a Mr. Taylor (a union representative) came in and "wanted to know if we were ready to sign up their contract with them and I told him no and he says, 'Well, we are just going to have to do this the hard way.' I told him, 'You will just have to do it. We are not willing to sign any contract and if that is

the way you want to do it, you will just have to do it the hard way.' So he left and he said, 'I will see you with a picket tomorrow morning'"; that the next morning, April 28th, a picket was placed near the entrance to plaintiffs' yard but on the highway and not on plaintiffs' property. The picket carried a banner of moderate size on which appeared the following:

"A. F. OF L.
PICKET

MILLMAN'S UNION 2020
TEAMSTER'S UNION 36
INVITES EMPLOYEES TO JOIN."

The picketing on the part of the unions was without violence, no untruths were claimed and there was no breach of the peace. There was only one banner carried at a time. There was no secondary boycott. No one was stopped entering or leaving plaintiff's property and no deliveries either way were stopped (by the defendants). There was evidence that on numerous occasions plaintiffs' trucks were followed when they made deliveries and that union trucks were seen circling jobs at which deliveries had been made and that as a result of this it was necessary for the plaintiffs to make delivery of merchandise through other yards. (Opinion of Appellate Court.)

There was testimony that union agent Collins told the manager of another lumber company in Escondido that "they couldn't do anything and that they guessed they would have to get tough with him now" (referring to the Valley Lumber Company), and that Collins told contractors and others that the Valley Lumber Company was being picketed.

The trial court found, in part, that during the past year plaintiffs have sold lumber and other materials of the value in excess of one quarter of a million dollars, which originated and were manufactured outside of the state of California; that plaintiffs' business affects interstate commerce; that defendants demanded that plaintiffs sign the union contract referred to herein; that none of the defendants offered or produced any evidence that any employee of plaintiffs has designated any of said unions as his collective bargaining representative; that none of the defendant unions had been recognized by the plaintiffs or certified by the National Labor Relations Board as the representative of any employee of the plaintiffs; that none of the defendants has been designated or is the collective bargaining agent for any employee of the plaintiffs and the said employees have indicated that they do not desire to join or be represented by any of the defendants; that the plaintiffs declined to execute the said contract and informed the defendants that they could not enter into it or any contract containing the provisions relative to union membership of the employees unless and until it should appear that the plaintiffs' employees or some appropriate unit thereof designates one of the defendants union as their collective bargaining agent; that on or about April 28, 1953, the defendants placed pickets around the place of business of plaintiffs in Escondido and maintained pickets there up to and including the trial of the action; that by the placing of the picket line about plaintiffs' place of business the defendants intended to compel the plaintiffs to enter into certain union agreements and did not intend to induce the employees of plaintiffs to join the said union or to educate the plaintiffs or the employees of plaintiffs or to inform

said employees of the benefits of unionization or to accomplish any other objective than to destroy the business of plaintiffs or to compel plaintiffs to execute said agreement without regard to the legality of doing so; that by the use of said pickets and by following the plaintiffs' trucks and by threatening persons doing business with plaintiffs and persons entering or about to enter plaintiffs' place of business with economic injuries, and by using language in the said picket lines calculated to instill fear of economic injury to such persons and by other means, and in order to compel the plaintiffs to execute the said agreement, even though it would be illegal to do so, the defendants and each of them have induced a number of the contractors engaged in the construction industry in or about the city of Escondido to cease doing business with plaintiffs and to refuse to accept deliveries in plaintiffs' trucks and have induced various suppliers of materials and common carriers of freight to refuse to make deliveries to plaintiffs and have prevented persons intending to enter plaintiff's place of business from doing so and thereby have injured plaintiffs' business and put them to great expense in making deliveries and picking up supplies purchased by them; that as a result of the acts of defendants plaintiffs have lost business and profits and their business has been damaged in the sum of $1,000.00; that the National Labor Relations Board has, pursuant to a policy declared by it, refused to take jurisdiction of the controversy between plaintiffs and defendants for the purpose of determining whether defendants should be designated as the collective bargaining representatives of the employees of plaintiffs.

Judgment was entered enjoining the defendants from picketing the place of business of plaintiffs, from follow-

ing their trucks, from preventing by means of threats persons having business with the plaintiffs from entering the premises of plaintiffs, from inducing by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept deliveries of goods from plaintiffs and from doing any other acts intended to injure plaintiffs' business in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by means of membership, or lack thereof, in any labor organization unless and until defendants or any one or more of them have been properly designated as the collective bargaining representatives of plaintiffs' employees or an appropriate unit thereof, and that plaintiffs have and recover damages in the sum of $1,000.00.

It is first contended that the Superior Court had no jurisdiction to entertain the suit herein or enter the judgment appealed from. While the appellants contend that the evidence shows that defendants were picketing plaintiffs' place of business for the purpose of inviting the employees to join the union, there was evidence to support the trial court's finding that their purpose was to compel plaintiffs to execute a union contract when none of the unions involved had been designated as the collective bargaining agent for said employees. The determination of the purpose or object sought to be accomplished by the picketing was one of fact for the trial court. (Standard Grocer Co. v. Local No. 406 of A. F. of L., 321 Mich. 276; 32 N. W. 2d 519, 529.)

The National Labor Relations Act, as amended in 1947 (29 U. S. C. A. 1953 Cumulative Pocket Part, pages 48 and 49) provides that it is an unfair labor

practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization and for a labor organization to force or require an employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of the title (Sec. 158 (4) (B).)

In Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 74 S. Ct. 161, decided December 14, 1953, petitioners were engaged in the trucking business and had 24 employees, four of whom were members of respondent union. The trucking operations formed a link to an interstate railroad. No controversy, labor dispute or strike was in progress, and at no time had petitioners objected to their employees joining the union. Respondents, however, placed rotating pickets, two at a time, at petitioner's loading platform. None were employees of petitioner. They carried signs reading "Local 776 Teamsters Union (A. F. of L.) wants Employees of Central Storage & Transfer Co. to join them to gain union wages, hours and working conditions." Picketing was orderly and peaceful but drivers of other carriers refused to cross this picket line and, as most of petitioners' interchange of freight was with unionized concerns, their business fell off as much as 95 per cent. The court below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union and concluded, after reviewing the Labor Management Relations Act (29 U. S. C. A., Sec. 141 *et seq.*) that such provisions for a comprehensive remedy precluded any state action by way of a

different or additional remedy for the correction of the identical grievance. The Supreme Court said:

"Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief. . . .

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit.

"On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State."

In Capital Service v. National Labor Relations Board, 74 S. Ct. 699, decided May 17, 1954, it was held that where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right.

In Gerry of Calif. v. Superior Court, 32 Cal. 2d 119 [194 P. 2d 689] it was held that under the National Labor Relations Act as amended in 1947, the State court has no jurisdiction, at the suit of a private person to enjoin union activities affecting interstate commerce when covered by the federal act: It was there said, quoting from Amalgamated U. Workers v. Consolidated Edison Co., 309 U. S. 261, 264 [60 S. Ct. 561, 84 L. Ed. 738]:

" 'Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.' The Supreme Court pointed out that the course of procedure was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair labor practice; that the board was chosen as the instrument or agency, exclusive of any private person or group, to assure

protection from the described unfair conduct in order to remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized."

It was further said:

"The provisions of the 1947 act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. . . . . The employers as well as the union is now required by the 1947 act to proceed before the board to obtain appropriate relief from unfair labor practices affecting interstate commerce. The alleged cause for injunctive relief presents matters for the board to determine in the first instance pursuant to the exercise of power vested by the National Labor Relations Act as amended by the 1947 act. There is nothing in the act as so amended which indicates that these unions may not thus be subject to the appropriate procedure thereby provided."

In *In re* DeSilvia, 33 Cal. 2d 76 [199 P. 2d 6], an employer had secured an injunction on the ground that the picketing was unlawful under the Labor Management Relations Act, 1947, since there had been no certification of a union representative. It was there held that the injunction issued was void, its object being to accomplish something which was within the exclusive jurisdiction of the National Labor Relations Board under

the terms of the federal act. In commenting on the Gerry case, *supra*, the court said:

"This court there held that the declared intent and purpose of the Labor Management Relations Act, 1947, was to vest exclusive jurisdiction in the National Labor Relations Board over unfair Labor practices affecting interstate commerce and to vest in the courts generally jurisdiction only of action for damages arising out of the commission of such practices, and that the act deprived the superior courts of original equitable jurisdiction in such cases."

The case of Sommers v. Metal Trades Council, 40 Cal. 2d 392 [254 P. 2d 539], involved a claimed violation of the jurisdictional Strike Act. (Lab. Code, Sec. 115 *et seq.*) and the same union activitiy was declared to be an unfair labor practice by the National Labor Relations Act, as amended. The question there was whether the state court had jurisdiction to enforce the provisions of the state statute making the defined union jurisdictional activity unlawful and subject to restraint. It was held that the trial court did not abuse its discretion in granting an injunction order pending a trial on the merits. The court discussed the Gerry case, *supra*, and observed that there the petitioners contended that the state had concurrent jurisdiction with the National Labor Relations Board to enforce the provisions of the federal act and that the decision rejecting this contention was a determination that in the absence of a valid, applicable local statute affording relief, facts which amount to unfair labor practices under the federal act are cognizable exclusively in a proceeding before the National Board. After discussing several United States Supreme Court cases on the subject, the court said:

"It is thus apparent that the factors of protection and condemnation under the federal act largely determine whether the area is one closed to state control. The decisions indicate that the presence of those factors are deemed to disclose an intention on the part of Congress to place exclusive jurisdiction in the National Board."

In the instant case plaintiffs pleaded and the court found that they were engaged in interstate commerce. The claimed objectionable conduct of the unions is defined in the federal act as an unfair labor practice but there is no state statute making it unlawful as was the case in Sommer v. Metal Trades Council, *supra*. We therefore conclude that the state court in the instant action had no jurisdiction to grant the permanent injunction herein.

It is argued that although the federal law is applicable, the National Labor Relations Board has, as a matter of policy, declined to accept jurisdiction and that there can be no conflict of remedies between the courts and the board. However, the evidence shows that on May 7, 1953, palintiffs' counsel mailed to the National Labor Relations Board a petition by the Valley Lumber Company for determination of representation of its lumber yard and delivery workers. This petition was apparently dismissed by the regional director for the reason that the scope of the business involved did not justify further proceedings. The petition contained no application to the National Board to take jurisdiction of an unfair labor practice charge and the evidence fails to show a refusal of the board to assume jurisdiction of the acts and conduct of the unions involved in that connection. Since the National Labor Relations Board had jurisdiction to deter-

mine plaintiffs' right to injunctive relief herein, the state court was without jurisdiction until plaintiffs exhausted their administratve remedy. (United States v. Superior Court, 19 Cal. 2d 189, 195; Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 292; Woodward v. Broadway Fed. S. & L. Assn., 111 Cal. App. 2d 218, 220; Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41; 82 L. Ed. 638.)

Respondents argue that the federal law does not prevent a state court from awarding damages for a violation of a state public policy which does not conflict with the federal law; that the remedy in the instant case is for intentional, unexcused injury to the business of another and that the injury herein is unexcused because for an unlawful purpose, namely, to compel the execution of a contract in violation of the National Labor Relations Act.

In United Const. Workers, Etc. v. Laburnum Const. Corp., *supra*, the court held that the Labor Management Act of 1947 (National Labor Relations Act, Sec. 10 (c), as amended by Labor Management Relations Act of 1947, 29 U. S. C. A. Sec. 160 (c); Labor Management Relations Act of 1947, Sec. 303 (b), 29 U. S. C. A. Sec. 187 (b).), did not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of common law court actions for damages as would preclude an appropriate state court from hearing and determining its issues even though such conduct constitutes unfair labor practice under that act; that Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. However, in this state peaceful picketing is a lawful form of

concerted action by members of the labor union. (Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 382, [106 P. 2d 403].) As was said in Seven Up Etc. Co. v. Grocery Etc. Union, 40 Cal. 2d 368, 374: "Peaceful picketing has been identified with freedom of speech—a means by which the pickets communicate to others the existence of a labor controversy." (Citing many cases.) In Park & T. I. Corp. v. Int. Etc. of Teamsters, 27 Cal. 2d 599, 603, the court said:

"In this state 'a union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor' but 'the object of concerted labor activity must be proper and . . . must be sought by lawful means, otherwise the persons injured by such activitiy may obtain damages or injunctive relief.' (James v. Marinship Corp., 25 Cal. 2d 721, 728, 729 [155 P. 2d 329], and authorities there cited.)"

In McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal. 2d 311, 319, the court said:

"Concerning the means used, it must be taken as settled in this state, that workmen may associate together and exert various forms of economic pressure upon employers, provided they act peaceably and honestly. The conventional means of exerting this economic pressure which have been held lawful are the strike . . . the boycott, both primary and secondary . . . and the picket . . ."

In Fortenbury v. Superior Court, 16 Cal. 2d 405, 410, it is held that the law does not invariably give relief against damage, because in some circumstances the infliction of damage, though intentional, is without legal rem-

edy. "So far as cases of picketing or boycott are concerned, there is no remedy for damage which may be inflicted where, as here, the means are peaceful and the purpose is reasonably related to working conditions or the right to bargain collectively."

In Bautista v. Jones, 25 Cal. 2d 746, 755, Mr. Justice Edmonds, in his concurring opinion, states:

"And in the exercise of its constitutional right of free speech, a union is privileged intentionally to induce others, in their relation with an employer, to apply economic pressure upon him resulting in injury. However, this privilege to interfere with a competitor's valuable and legally protected economic interests is not an absolute one, but is qualified and conditional.

"The first limitation which has been applied by this court is that a union, in compelling compliance with its demands through the application of economic pressure, induced by publication of the facts and solicitation of support, is privileged to invade the interests of others only where it employs peaceful and truthful means. (Citing cases:) The second general condition necessary to justify the invasion of economic interest is that the end be lawful. 'Any injury to a lawful business . . . . is *prima facie* actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare.' (J. F. Parkinson Co. v. Building Trades Council, *supra.*)"

In the instant case the attempt by the unions to induce plaintiffs to sign the contract involved is not made unlawful by statute in this state. The means used were peaceful and the purpose is reasonably related to working conditions and the right to bargain collectively. Dam-

ages, if any, suffered by plaintiffs were occasioned by the presence of a picket near plaintiffs' place of business, carrying a banner inviting plaintiffs' employees to join the union and not by the alleged purpose of the picketing. Moreover, the award of damages in the sum of $1,000.00 was apparently based on the testimony of one Glenn Bailey that he had once purchased materials from the plaintiffs but that he had overheard a conversation between a union representative and the witness contractor in which they were discussing the picketing of plaintiffs' place of business; that he had intended to buy his materials on a new job from plaintiffs but had changed his mind; that the approximate cost of materials on the new job was $4,000.00. The award of $1,000.00 damages was not supported by substantial evidence that it was caused by the tortious conduct of defendants or any of them.

The attempted appeal from the order overruling the demurrer herein is dismissed as such an order is not appealable. (Garroway v. Jennings, 180 Cal. 97; Southern Cal. Tel. Co. v. Damenstein, 81 Cal. App. 2d 216; Cook v. Stewart McKee & Co., 68 Cal. App. 2d 758.)

Judgment reversed.

MUSSELL, *J.*

I Concur:

BARNARD, *P. J.*

APPENDIX "D."

Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California in Bank.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs and Respondents, vs. San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36, Defendants and Appellants. L. A. 23005.

Filed Dec. 2, 1955.

The Garmons, while engaged in business as partners under the name of Valley Lumber Company, became involved in a dispute with union labor organizations. The appeal is from a judgment which enjoins the unions and their members from carrying on certain activities and awards damages in the amount of $1,000 against them.

Following a trial, the court made these findings of fact:

Valley Lumber Company is engaged in the business of selling lumber and building materials, and its operations affect interstate commerce. In the previous year it sold materials originating and manufactured out of California of a value exceeding $250,000. None of its employees belong to any of the defendant unions and none have designated either of them as a labor representative. The employees have indicated that they do not desire to join, or be represented by, a union. The National Labor Relations Board has not certified either of the unions as the representative of the employers and the company has not recognized any union as such.

The union demanded a labor agreement containing a clause which would require the company to employ, and continue in employment, only such persons as are, or immediately become, members of the defendant unions.[1] The company refused to execute the agreement, upon the grounds that it would be a violation of the National Labor Relations Act to do so before the employees, or an appropriate unit thereof, designated a union as its collective bargaining agent. Shortly thereafter, the unions placed pickets at the company's place of business.

The intent of the unions was not to induce the employees to join one of them, or to provide education or information as to the benefits of unionization. The only purpose was to force the company to execute the agreement or suffer destruction of its business. In addition to picketing, union agents followed the company's trucks and threatened persons about to enter its place of business with economic injury. By this conduct, and the use of language calculated to instill fear of such injury, the unions induced building contractors to discontinue their patronage of the company, with subsequent damage to the business amounting to $1,000.

The National Labor Relations Board, ". . . pursuant to a policy declared by it, refused to take jurisdiction of the controversy between plaintiffs and defendants for the

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[1]"Pursuant to the terms of Section 8(a)(3) of the Labor Management Relations Act, 1947, there shall be no limitation of the Employer as to whom he shall employ, continue in employment, or discharge, except that every employee listed under Section III, (A) and (B), hereof not otherwise excluded, shall be, or shall make application within thirty (30) days, become and remain a member in good standing of Millmen's Union, Local 2020, of the United Brotherhood of Carpenters and Joiners of America, or Building Material and Dump Truck Drivers, Local 36."

purpose of determining whether defendants should be designated as the collective bargaining representative of the employees of plaintiffs."

Upon these findings a judgment was entered which awards the company $1,000 damages and enjoins the unions ". . . from picketing the places of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, express or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof."

The unions contend that jurisdiction of the controversy is exclusively in the National Labor Relations Board. They also attack the judgment upon the grounds that the company did not exhaust its administrative remedies. Other points presented are: the evidence does not support the findings; the findings do not include all issues tendered; the award of damages is based upon evidence entirely speculative; and, the record shows no violation of any state law.

In support of the judgment, the company asserts that the jurisdiction of the national board is not exclusive, or if it is, the state court may enjoin unlawful conduct when the board has declined to act. Another point relied upon is that, regardless of state jurisdiction to enjoin the unions, the superior court's award of damages for violation of the state's public policy is not contrary to any federal law.

The National Labor Relations Board has exclusive primary jurisdiction to prevent unlawful demands. (Weser v. Anheuser-Busch, Inc., ... U. S. .....; Garner v. Teamsters, Chauffeurs, and Helpers, etc., 74 S. Ct. 161; United Construction Workers v. Laburnum Const. Corp., 347 U. S. 656; Bethlehem Steel v. N. Y. State LRB, 330 U. S. 769.) The purpose of the picketing was to compel the company to sign an agreement which included a clause requiring the employer to encourage membership in the unions. In the circumstances here shown, under the Labor Management Relations Act, this was an unfair labor practice.[2]

In the Garner case, a Pennsylvania court enjoined picketing which, contrary to a state statute, was being carried on for the purpose of coercing an employer to compel or "influence" employees to join the union. The

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[2](a) "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

(b) "It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." (29 U. S. C. §158.)

State Supreme Court reversed the judgment upon the ground that the employer's sole remedy was that provided by the National Labor Management Relations Act. (Garner v. Teamsters, [Pa.] 94 A. 2d 893.) The United States Supreme Court agreed, holding "that petitioner's grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices . . ."

However, the Board need not accept every controversy of which it has jurisdiction. (Haleston Drug Stores v. National Labor Relations Board, 187 Fed. 2d 418. See discussion by Philip Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Labor Law Journal 114.) It hears and determines controversies only in connection with "enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." (National Board Press release dated October 6, 1950.)

In the present case, the employer's position is that, when the National Labor Relations Board refuses to take jurisdiction of a dispute because the effect of the company's business on interstate commerce is not substantial, the state courts may act. The United States Supreme Court has not decided this question. In the Garner case it pointed to the lack of any indication that "the federal Board would decline to exercise its powers once its jurisdiction was invoked." (Garner v. Teamsters, etc., 74 S. Ct. 161 at 164.) Later in Building Trades Council *et al.* v. Kinard Construction Co., 346 U. S. 933, in reversing a state court's affirmance of an injunction on the authority of the Garner case, it said: "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the

Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction."

The reason for prohibiting state courts from acting in cases in which the Board has jurisdiction is to obtain uniform application of the substantive rules as expressed by Congress, and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. (Garner v. Teamsters, etc., 74 S. Ct. 161, 166.) A remedy under federal laws available to an injured party may justify pre-emption of the field of labor relations, but when the application of that rule would result in the loss of all protection, there is no reason to bar state courts from providing relief. There is no conflict of jurisdiction when the federal board determines not to adjudicate the issues. Furthermore, a refusal to accept jurisdiction upon the ground that the issue presented does not sufficiently affect the national welfare to justify the Board's attention, in effect, is a declaration that the national labor policy will not be jeopardized if the state assumes jurisdiction.

When Congress enacted the applicable statutes, it must have been aware that an unfair labor practice may affect management and labor in a small business to the same extent as in a large industry. The difference is only the effect on the national labor and economic level. Certainly Congress did not intend to deprive a business having only a limited effect on interstate commerce of all protection in a labor-management controversy. By giving the Board discretion to accept or refuse jurisdiction, the legislative purpose must have been to give the state courts jurisdiction when the Board specifically determines that the

controversy will not affect the national economy. (Accord: Your Food Stores v. Retail Clerks' Local No. 1564, 124 Fed. Supp. 697, 703; Truck Drivers, Etc. v. Whitfield Transportation, 273 S. W. 2d 857, 860; But *Cf.*: New York State Labor Relations Board v. Wags Transportation System, 130 N. Y. S. 2d 731; Universal Car & Service Company v. International Association of Machinists, 27 CCH Labor Law Reporter, 68,825.)

In the present case, the employer filed a petition for determination of representation, pursuant to the provisions of the National Labor Relations Act. It was informed by letter that "The amount of business done by Valley Lumber Company in interstate commerce is insufficient for the Board to assert jurisdiction on the basis of previous Board decisions." Later, the regional director of the Board dismissed the petition, after a careful investigation. He stated that "in view of the scope of the business operation involved, it would not effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time . . ." It appears without conflict that only $250,000 of the company's business during the preceding year was in interstate commerce, either directly or indirectly. In view of the general pronouncement by the Board (Press Releases dated October 6, 1950 and July 14, 1954) that it will exercise jurisdiction only when an "enterprise" has a direct inflow of material valued at $500,000 a year, or an indirect flow valued at $1,000,000, a request for review of the Regional Director's action would have been futile.

The general policy of the Board in regard to jurisdiction makes no distinction between an application to determine representation and one complaining of an un-

fair labor practice. A refusal to take jurisdiction of a controversy concerning representation constitutes a refusal to accept jurisdiction of a complaint against that employer which charges an unfair labor practice. In C. A. Braukman, etc. and International Union of Operating Engineers, 94 N. L. R. B. 234, the Board said, "True, the Board has not heretofore considered the instant complaint case. However, because the Board does not, with respect to the question of jurisdiction, differentiate between representation and complaint cases, we believe that dismissal of the . . . representation case on jurisdictional grounds . . . . was in effect, notice to all parties concerned that any complaint case based on alleged unfair labor practices . . . . would similarly be dismissed." (Also see: National Labor Relations Board v. Guy F. Atkinson Co., 195 Fed. 2d 141.)

Section 10(a) of the Taft-Hartley Act, (29 U. S. C. 160(a)) gives the Board the power to prevent any person from engaging in an unfair labor practice when it affects interstate commerce. That section also empowers the Board, by agreement, to cede jurisdiction of cases affecting such commerce to state agencies so long as the state law is not inconsistent with the national labor policy as expressed in the federal laws. But Congress has not prohibited the state from assuming jurisdiction of conduct which would amount to an unfair labor practice under the federal law when the Board refuses to take jurisdiction. When jurisdiction is declined by the Board, the legislative mandate that nothing shall affect the Board's power to enforce the act is not infringed upon.

The basis for refusing to allow a state court to take jurisdiction of a dispute within the cognizance of the Board *in advance* of action by it is the purpose to avoid

a possible conflict between state policy and that of the Board in an area in which the federal body has not had an opportunity to act. "Coincidence" of policy, the United States Supreme Court has declared, is not sufficient to avoid the danger of a possible conflict. (Bethlehem Steel v. N. Y. State LRB, 330 U. S. 769.) However, if the state court should refuse to assume jurisdiction when the Board has affirmatively declined to act, one party to the labor controversy might be able to flout the policy expressed by Congress in the national legislation.

The unions complain of the court's asserted failure to make a finding on their allegation that there was no unfair labor practice because, as clearly stated, the contract was not to be signed, and if signed, would not be accepted by the union unless the employees became members of it. But the findings that the unions presented the agreement to the company with a demand for its signature, followed by picketing and other activity with the purpose to compel the employer to execute the agreement although it would be illegal to do so, was a determination against the unions upon this defense.

The company argues that the trial court properly gave both damages and injunctive relief. It relies upon the rule stated in James v. Marinship, 25 Cal. 2d 721, that "the object of concerted labor activity must be proper and that it must be sought by lawful means, otherwise the persons injured may obtain damages or injunctive relief." (P. 728.) They assert that damages were a proper redress for the injuries previously suffered from the picketing and concerted activities by defendants and an injunction is proper to avoid future injury. The appellants take the position that "the conduct of the labor

union was lawful and proper in the light of both federal and state law."

One argument is that since the ultimate objective of the concerted economic pressure was to obtain a closed shop, which is a proper labor objective under the law of California (McKay v. Retail Auto L.L. Union No. 1067, 16 Cal. 2d 311, 327; Shafer v. Registered Pharmicists Union, 16 Cal. 2d 379, 387-388), the purpose of the picketing was not "unlawful" and hence not within the rule of the Marinship case. For this proposition, reliance is placed upon Park & Tilford I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599.

The Park & Tilford case concerned an injunction which, a majority of the court concluded, was broader than that allowed by the pleadings and the evidence. There, without having obtained the requisite majority of employees for the purposes of collective bargaining, a labor organization picketed and boycotted the employer after demanding of him that he sign a closed shop agreement with that organization. An injunction was granted restraining the union from all interference with the sale or delivery of the plaintiff's products and from all picketing and boycotting of its business. This relief was too broad, said a majority of the court, although the trial judge was correct in the conclusion that the demands made by the union were unlawful under the National Labor Relations Act.

The evidence as to the union's conduct, said the court, did not support the finding that the purpose of the concerted economic pressure was to compel the employer to violate the federal law by discriminating as to his employer's choice of union representation. Instead, it was held, the ultimate purpose of the economic pressure was

to bring about a closed shop agreement, which would be lawful under both California law and the controlling federal statutes. The court further held that, although the federal act made unlawful the employer's signing of such an agreement before a requisite majority of his employees was obtained by the union, the statute did not proscribe the assertion of economic pressure by the unions upon both him and his employees, to compel their accession to union demands, before the time at which the employer might lawfully comply with them. This construction of the federal act was based, in part, upon an analogy made to the Shafer and McKay cases, *supra,* in which quite similar provisions in sections 921-923 of the California Labor Code were construed as protecting employees from improper employer influence but not as protecting the employer from economic pressure designed to bring about a closed shop agreement.

Since those decisions, however, the federal statute has been broadened to extend protection to the employer from such activities. (29 U. S. C., §158 (b)(2).) The assertion of economic pressure to compel an employer to sign the type of agreement here involved is an unfair labor practice under section 8(b)(2) of the Act. (*Cf.* Great Atlantic & Pacific Tea Co. (1949), 81 N.L.R.B. 1052.) Concerted labor activities for such a purpose thus were unlawful under the federal statute, and for that reason were not privileged under the California law. (*Cf.* Park & Tilford I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599, 604; Lillefloren v. Superior Court, 31 Cal. 2d 439, 440.)

It is argued, however, that the purpose of the concerted activities here complained of was to invite the employees to join the union. But the court found that the purpose

of the picketing was not to induce the employees to join the unions but to compel the company to sign the proffered agreement or suffer destruction of its business. To hold that a contrary objective was intended would require this court to draw different inferences from the evidence which amply supports the finding of the trial court.

Finally, it is argued that the evidence does not support the finding as to the amount of damages. However, there is testimony that the employer, as a result of the picketing, was required to pick up and deliver its products at different yards, incurring the expense of additional man hours and trucking facilities. The record also shows that at least one prospective purchaser was induced to purchase materials at another yard because of the union activities, resulting in the loss of profits at least as great as the amount of damages awarded. This evidence amply supports the judgment insofar as damages are concerned.

The judgment is affirmed.

EDMUNDS, *J.*

We concur:
SHENK, *J.*
SCHAUER, *J.*
SPENCE, *J.*

DISSENTING OPINION.

I dissent.

In this case defendant unions were enjoined from peaceful picketing to organize plaintiffs' employees, have them join defendants and have defendants as their bargaining representatives; damages were also awarded to plaintiffs for the picketing. The trial court found that plaintiffs' business affected interstate commerce. Plaintiffs

requested the National Labor Relations Board to hold an election to determine who should represent their employees. The board dismissed the proceeding. The majority opinion holds that the case is one in which the board would normally have jurisdiction and the state court would not, because defendants' activity was an unfair labor practice under the National Labor Management Relations Act (29 U. S. C. A. §151 *et seq.*)* but, says the majority, in this case the state court has jurisdiction because the board refused to take jurisdiction by dismissing the representation proceedings and that federal law (Labor Management Relations Act) rather than state law is applicable; that under the federal law defendants' conduct being an unfair labor practice, the picketing was for an unlawful purpose. Hence defendants were properly enjoined and damages awarded against them. In other words, the state court is to enforce the federal law.

Those conclusions are fallacious for the following reasons: (1) The national board and the powers granted to it are an integral part of the federal law and that law is not intended to have application in a situation where the board plays no part; it is inescapable that the federal law is to be administered by the board, not by the state courts. (2) The board in refusing jurisdiction as it has power to do, has in effect determined that the federal law should not apply in this case. (3) It is neither feasible nor fair to apply the federal law. (4) There has not been such a refusal to exercise jurisdiction by the

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*That is clearly the law. (Weber v. Anheuser-Busch, Inc., 75 S. Ct. 480; Garner v. Teamsters Union, 346 U. S. 485; United States Workers v. Laburnum, 347 U. S. 656; Building Trades Council *et al.* v. Kinard Construction Co., 346 U. S. 933.)

board here as to justify the conclusion that the state court has jurisdiction.

Before discussing those points it should be observed that under our law defendants' activity is lawful and hence neither damages nor injunctive relief is proper. The majority does not question this proposition. The rule was stated with the citation of many supporting authorities in Park & T. I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599, 604: "The closed shop is recognized as a proper objective of concerted labor activities, even when undertaken by a union that represents none of the employees of the employer against whom the activities are directed. (McKay v. Retail etc. Union No. 1067, 16 Cal. 2d 311, 319, 322 [106 P. 2d 373]; Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 382 [106 P. 2d 403]; C. S. Smith Met. Market Co. v. Lyons, 16 Cal. 2d 389 [106 P. 2d 414]; Sontag Chain Stores Co. v. Superior Court, 18 Cal. 2d 92 [113 P. 2d 689]; see Fortenbury v. Superior Court, 16 Cal. 2d 405 [106 P. 2d 411]; Steiner v. Long Beach Local No. 128, 19 Cal. 2d 676, 682 [123 P. 2d 20]; Emde v. San Joaquin County etc. Council, 23 Cal. 2d 146, 155 [143 P. 2d 20, 150 A. L. R. 916]; Lisse v. Local Union, 2 Cal. 2d 312 [41 P. 2d 314]; In re Lyons, 27 Cal. App. 2d 293 [81 P. 2d 190]; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581 [98 P. 1027, 16 Ann. Cas. 1165, 21 L. R. A. N. S. 550]; Pierce v. Stablemen's Union, 156 Cal. 70 [103 P. 324].) . . . A union may picket and boycott an employer's business with the object of so discouraging public support of the business that the nonunion workers will face the prospect of the loss of their jobs. . . .

"Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business. (See C. S. Smith Met. Market Co. v. Lyons, 16 Cal. 2d 389, 398 [106 P. 2d 414].) 'The law . . . permits workers to organize and use their combined power in the market, thus restoring, it is thought, the equality of bargaining power upon which the benefits of competition and free enterprise rest. Accordingly, the propriety of the object of workers' concerted activity does not depend upon a judicial determination of its fairness as between workers and employers.' (4 Restatement: Torts, p. 118.) . . .

"[I]n Shafer v. Registered Pharmacists Union, *supra*, the court stated: 'The argument is . . . made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right "to coerce" the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain "unorganized," and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights. (Senn v. Tile Layers' Union, 301 U. S. 468 [57 S. Ct. 857, 81 L. Ed.

1229]; Lauf v. E. G. Shinner & Co., 303 U. S. 323 [58 S. Ct. 578, 82 L. Ed. 372]; Fur Workers' Union No. 72 v. Fur Workers' Union No. 21238 (1940), 105 F. 2d 1, aff'd 308 U. S. 522 [60 S. Ct. 292, 84 L. Ed. 443].)"

Speaking to the first point, it is clear that the national board and not a state court is to administer the federal law, at least in situations involving unfair labor practices. It is the forum which is to decide what steps, if any, should be taken, to interpret initially the law, to make rules and regulations amplifying the law, to decide what is best for interstate commerce when activity in a labor controversy is claimed to interfere with it, to maintain uniformity in the treatment of cases, etc. The stated purpose of the federal law is to preserve certain rights and protect commerce (29 U. S. C. A. §151). The national board is created and it must report to Congress on the cases it has heard. (*Id.*, §153.) It may make rules and regulations to carry out the act. (*Id.*, §156.) Unfair labor practices are defined. (*Id.*, §158.) The board "shall decide" ". . . whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of sections 151-166 of this title, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected." (*Id.*, §159.) The board ". . . is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter." (*Id.*, §160.) If it is charged that an unfair labor practice is being committed the board "may" issue a complaint and shall decide the matter; *it* "may" ask a *federal* court for equitable relief in enforcing its decision, and its decision may be reviewed by a *federal* court. (*Id.*, §160.) Immunity from prosecution is accorded witnesses who are compelled to testify before the board. (*Id.*, §161.) These and many other provisions clearly envision that the federal law is not to operate without the national board. That proposition was pointed out in Garner v. Teamsters Union, 346 U. S. 485, 488: "Congress has taken in hand this particular type of controversy where it affects interstate commerce. . . . [I]t has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with

us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. . . .

"*Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.* Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. . . . And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." (Emphasis added.) And it is said in Textile Workers Union of America v. Arista Mills Co., 193 F. 2d 529, 533: "'It is perfectly clear, both from the history of the National Labor Relations Act and from

the decisions rendered thereunder, that the purpose of that act was "to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining"; that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined.'" It should be clear, therefore, that the Labor Management Relations Act in dealing with unfair labor practices can only be enforced by the intervention of the national board, and that state courts are not in a position to apply that law.

In regard to the second point it is settled that the national board may refuse jurisdiction because interstate commerce is not sufficiently affected. "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that *the policies of the Act would not be effectuated* by its assertion of jurisdiction in that case." (Emphasis added; Labor Board v. Denver Bldg. Council, 341 U. S. 675, 684; see, also, Haleston Drug Stores v. National Labor Relations Bd., 187 F. 2d 418, cert. denied 342 U. S. 815; National Labor Rel. Bd. v. Atlanta Metalic Casket Co., 205 F. 2d 931; National Labor Relations Board v. Stoller, 207 F. 2d 305; National Labor Relations Bd. v. Guy F. Atkinson Co., 195 F. 2d 141; note, 98 L. Ed. 221.) That power necessarily includes the power to determine that the federal law shall not apply in a particular case. When it refuses to take jurisdiction in a particular case because commerce is not affected and the "*purposes* of the Act will

not "*be effectuated*" by assertion of jurisdiction it has said that the case is not one for the application of the federal law and the state court should not override that decision as it has done in this case. It is true that the board is given power to cede jurisdiction to a state agency by agreement with such agency over any cases in any industry even though such cases may involve labor disputes affecting interstate commerce *unless,* however, the state's applicable "statute" is "inconsistent" with the federal act. (29 U. S. C. A. §160(a).) There has been no cession here,* but the cession provision indicates that in such cases the state is in effect applying federal law because there can be no cession unless the federal and state law are consistent in both wording and interpretation. It thus may be inferred that the states are to apply the federal law only in the situation where the cession requirements are met. In other situations it is to apply its own law. When we come to the power of the federal board to refuse jurisdiction, as distinguished from cessation, we find that power is to make such refusal because the *board finds* or states "that the *policies of the Act* would not be effectuated by" the board's assertion of jurisdiction (emphasis added). (See Labor Board v. Denver Bldg. Council, *supra,* 341 U. S. 675, 684; and cases cited *supra,* together with the statement in the decision by the regional director in this particular case as to why jurisdiction was refused.) In other words the board has the power under its authority to refuse jurisdiction—to decide that the "policies" declared by the provisions of the federal act, shall not apply in a particular case. The board having made that determination

*We have neither statute nor agency covering the field.

it follows that the state court should not apply the federal act where the board has refused to act. Implicit also in the power of refusal is the board's conclusion that there is no need for uniformity of decision in order that businesses and labor in interstate commerce will be similarly treated. Moreover the board having exclusive jurisdiction generally, it also has exclusive jurisdiction to determine that interstate commerce is not sufficiently affected for the federal law to operate. The state court thus has no jurisdiction to decide to the contrary.

Thirdly, it is neither feasible nor fair to apply the federal law in this case. We have no agency such as a labor relations board in this state or anything like it. There are no facilities for conducting representation elections to determine whether a union shall be the collective bargaining agent for the employees, a question which may be basic in passing upon unfair labor practice charges. We have no body with the facilities nor expertness in the field. Our courts are at a disadvantage in sizing up the national picture—the impact upon interstate commerce—in deciding such controversies. The courts cannot make rules and regulations on the subject as may the national board. They cannot achieve the uniformity that is vital under the federal law, not having available to them, as does the national board, the nation-wide circumstances.

The discrimination which results from the majority holding is manifest. An employer, although engaged in business affecting interstate commerce, yet not enough in the board's view to justify taking jurisdiction and applying the federal law, is essentially a local operator and such business should have applied to it the state law the same as its competitors whose business is purely intra-

state. There is no rational basis for discriminating between the two classes of business or the employees or unions concerned. Neither has any meaningful impact on interstate commerce and thus both should be amenable to the same law—the state law governing intrastate commerce—employer-employee-union relations.

In the foregoing discussion it has been assumed that there was a refusal by the national board to take jurisdiction of the case and that such refusal is ground for saying the state court has jurisdiction. The latter question has not been settled by the United States Supreme Court. In Garner v. Teamsters Union, *supra*, 346 U. S. 485, 488, the court held, as above indicated, that the board had exclusive jurisdiction but in discussing the question, mentioned that "Nor is there any suggestion that respondents' plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked." In the later case of Building Trades Council *et al.* v. Kinard Construction Co., *supra*, 346 U. S. 933, the court reversed (in a memorandum opinion) the state court's (Supreme Court of Alabama) affirmance of an injunction on the basis of the Garner case and in so doing stated: "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction." It was pointed out in the decision by the Alabama Supreme Court (Kinard Const. Co. v. Building Trades Council, *supra*, 64 So. 2d 400, 402) that the board had made the general criteria statement,

the same as it did here, as to the cases in which it would take jurisdiction. I interpret the Kinard case as holding, therefore, that such a general pronouncement as that made by the board here is not sufficient to show that the board would refuse to exercise jurisdiction. We have, therefore, the first question as to whether there has been a sufficient showing of refusal to exercise jurisdiction in this case, assuming such refusal would leave the matter open to state action. It would appear that there is not sufficient showing of refusal here. Although the regional director mentioned the scope of plaintiffs' business, it may well have been that his investigation revealed the facts as found by the court, that none of plaintiffs' employees desired representation by the unions and hence an election would be futile. Also the director said that no action would be taken at "this time" implying that a change of conditions might bring a different result or that the charge of an unfair labor practice, a condition the court here found to exist, might result in board action. While it may have been that because of the smallness of the business here involved a representation election would not be ordered by the board and for the same reason a complaint for unfair labor practices would not be considered, it would appear that an effort should be made to have the board take jurisdiction of the precise question involved in the state court action, rather than the side issue of representation, before it may be said the board has refused to assume jurisdiction. That precise question is whether there has been an unfair labor practice for which a remedy may be obtained. We said in *In re* De Silva, 33 Cal. 2d 76, 78: "No distinction may be made here because the National Labor Relations Board had denied the company's petition for certification of a

union representation. By the denial the board did not divest itself of jurisdiction to determine whether the defendants were committing unfair labor practices affecting interstate commerce which should be enjoined pursuant to the procedure provided by the act. Its exclusive jurisdiction over that matter had not been invoked by the plaintiffs."

Furthermore, there is also an insufficiency of a showing that the board would not act, in that, as pointed out by the regional director, plaintiffs could have appealed the dismissal of their representation petition to the national board in Washington, D. C. This they did not do. The dismissal may have been reversed. "There is no doubt that the administrative remedy is not exhausted where a party fails to appeal from an administrative decision to a higher tribunal within the administrative machinery, or, having filed an appeal, fails to await a determination thereon before his resort to the courts." (42 Am. Jur., Public Administrative Law, §202; see, Woodward v. Broadway Fed. etc., 111 Cal. App. 2d 218; 2 Cal. Jur. 2d, Administrative Law, §187.) It is suggested, however, that an appeal would consume an amount of time that would render any remedy from the board ineffective, and that the criteria statement of the board above quoted indicates an appeal would be futile. Neither point has merit.

The delay is one of the incidents of the procedure before the board established by Congress to handle certain labor controversies. In a situation in which it was held that a federal court would not enjoin a state court from giving relief in a case under the Labor Management Relations Act and the union had to follow the state

action through the state appellate procedure and then apply to the Supreme Court, the court stated in regard to the delay caused by following the state appellate procedure, "Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them. To permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established. A district court's assertion of equity power or its denial may in turn give rise to appellate review on this collateral issue. There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties." (Amalgamated Clothing Workers v. Richman Brothers, 75 S. Ct. 452, 457.)

The statement of criteria is no more reason to declare that an appeal to the board would be futile than that it makes an application to the regional director unnecessary. The same reasons, that is, that there should be a final determination by the director and board before it can be said the board has refused to exercise its jurisdiction, apply to the necessity for an appeal. The board as such has not acted until an appeal is taken and determined. The essence of state jurisdiction if the board refuses to act is an unequivocal final determination by the board that it will not act. Indeed, the board may on appeal determine that a representation election, the only thing asked by plaintiffs, is not appropriate because none of their employees belong or desire to join the union rather than that the policies of the federal law will not be effectuated by taking jurisdiction. As heretofore pointed out, the United States Supreme Court has in effect held that

a general criteria statement is not enough to amount to a refusal by the board to take jurisdiction. (Building Trades Council v. Kinard Construction Co., *supra,* 346 U. S. 933.)

In the foregoing discussion I have assumed that the majority adheres to the state law as stated in Park & T. I. Corp. v. Int. etc. of Teamsters, quoted *supra, 27* Cal. 2d 599, and the many cases there cited, and I trust there is no thought of overruling those cases without saying so although it applies the federal law by using the ritual of unlawful purpose.* However, it is not clearly pointed out that under our law the purpose of the picketing here involved is not unlawful or that the court is applying the federal law only because interstate commerce is affected.

The judgment should be reversed.

CARTER, *J.*

We concur:

GIBSON, *C. J.*

TRAYNOR, *J.*

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*Picketing for an unlawful purpose may be enjoined under state law; the purpose here is unlawful under the federal law, and hence enjoinable, but is lawful under state law and therefore not enjoinable.

APPENDIX "E."

CASES AND ARTICLES.

I. *Cases.*

A. In the following cases, state courts have held they have jurisdiction to act when the Board declines to do so:

Dallas General Drivers, etc., Union v. Jax Beer Co., 36 LRRM 2188 (Tex. Civ. App. Feb. 25, 1955);

Hammer v. Local No. 211, 111 A. 2d 308 (N. J. 1955);

School District v. Grand Rapids Building & Construction Trades Council, 37 LRRM 2232 (Mich. Cir. Ct. Nov. 20, 1955);

Satin, Inc. v. Local–445 Electrical Workers, 34 LRRM 2258 (Mich. Cir. Ct. May 12, 1954).

B. In the following cases, state labor relations boards have held they have jurisdiction to act when the Board declines to do so:

Norwich Lumber Co., (Conn.) 36 LRRM 1500 July 26, 1955);

Raisch Motors, 35 LRRM 1631 (N. Y. Mar. 10, 1955);

Victory Chain, Inc., 34 LRRM 1664 (N. Y. 1954);

Cooper-Veter Lumber Co., 34 LRRM 1287 (Wisc. May, 1954);

Walker Motors, 36 LRRM 1290 (Mich. July, 1955).

C. In the following cases, state courts have held they have no jurisdiction despite refusal by the Board to act. (See citations from petition: Your Food; Wags; Universal Car.)

D. In the following cases, the issues involved in this petition were discussed, though not decided:

NLRB v. Swift & Co., 13 F. Supp. 214 (D. C. E. Mo., 1955);

Nettleton, A. E., Co. v. Shoe Workers, 138 N. Y. S. 2d 256 (Sup. Ct. 1955);

Collins v. Merritt-Chapman & Scott, 87 S. E. 2d 337 (Ga. Ct. App. 1955);

Building Trades Council v. Bonito, 280 P. 2d 295 (Nev. 1955);

Benjamin v. Foidl, 379 Pa. 540, 109 A. 2d 300 (1954);

Meat Cutters Local 576 v. Johnson, 286 P. 2d 182 (Kan. 1955).

II. *Legal Literature discussing questions presented in petition.*

A. Articles.

Brody, Federal Preemption Comes of Age in Labor Relations, 5 Labor L. J. 743 (1954);

Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297 (1954);

Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Labor L. J. 114 (1952);

Glushien, Federal Preemption in Labor Relations, 15 Fed. Bar J. 4.

Hays, Federalism and Labor Relations in the United States, 102 U. Pa. L. Rev. 959 (1954);

Petro, Participation by the States in the Enforcement and Development of National Labor Policy, 28 N. Dame L. Rev. 1 (1952);

Pollard, Federal Labor Law: Administrative Recession, 6 Labor L. J. 863 (1955);

Preston, Federal "Preemption" in Labor Relations: A Reply to Professor Cox, 36 Chi. B. Rec. 121 (1954);

Rose, Garner v. Teamsters: The Supreme Court and Private Rights, 40 Va. L. Rev. 177 (1954);

Roumell & Schlesinger, Preemption Dilemma in Labor Relations, 18 U. Detroit L. J. 17 (1955);

Shute, State v. Federal Jurisdiction in Labor Disputes: The Garner Case, 19 Mo. L. Rev. 119 (1954);

Witney, NLRB Jurisdictional Policies and the Federal-State Relationship, 6 Labor L. J. 3 (1955);

Wollett, Taft-Hartley and State Power to Regulate Labor Relations, 30 Wash. L. Rev. 1 (1955);

Symposium, Federal Preemption in Labor Relations, 15 Fed. B. J. (1955);

Symposium, Current Trends in the Law of Labor Relations, 50 N. W. U. L. Rev. 190 (1955).

B. Notes:

39 Minn. L. Rev. 911 (1955);

65 Yale L. J. 86 (1955);

9 Rutgers L. Rev. 776 (1955);

4 Utah L. Rev. 380 (1955);

3 St. Louis U. L. J. 215 (1954);

23 U. Kan. City L. Rev. 222 (1955);

4 J. Pub. Law 186 (1955);

6 Western L. Rev. 417 (1955);

55 Col. L. Rev. 754 (1955);

16 U. Pitts. L. Rev. 376 (1955);

1955 U. Ill. L. F. 332;

17 Ga. B. J. 532 (1955);

8 Vand. L. Rev. 916 (1955);

2 U. C. L. A. L. Rev. 377 (1955);

43 Ky. L. J. 443 (1955);

16 Ohio S. L. J. 443 (1955);

24 U. Cin. L. Rev. 143 (1955);
29 N. Y. U. L. Rev. 524 (1954);
27 Rocky Mt. L. Rev. 330 (1955);
55 Col. L. Rev. 112 (1955);
43 Georgetown L. J. 67 (1954);
3 Buffalo L. Rev. 326 (1954);
54 Col. L. Rev. 997 (1954);
29 N. Dame Law 495 (1954);
22 Geo. Washington L. Rev. 770 (1954);
42 Georgetown L. J. 474 (1954);
28 Tul. L. Rev. 496 (1954);
1 U. C. L. A. Rev. 615 (1954);
15 U. Pitt. L. Rev. 519 (1954);
31 Dicta 255 (1954);
53 Mich. L. Rev. 602 (1955);
7 S. C. L. Q. 478 (1955);
6 Syracuse L. Rev. 145 (1954).

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

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No. 50

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Petitioners,

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Respondents.

OPENING BRIEF OF PETITIONERS.

OPINIONS BELOW.

The opinion of the Fourth District Court of Appeal of the State of California is unreported but found in 127 A.C.A. 320. The opinion of the Supreme Court of the State of California is reported in 45 Cal. 2d 657.

JURISDICTION.

The judgment of the Supreme Court of the State of California was entered on December 2, 1955. A timely petition for rehearing was filed and denied on December 28, 1955. A petition for a writ of certiorari was filed on March 22, 1956 and granted on May 7, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATUTE INVOLVED.

The statutory provisions involved are the Taft-Hartley Act (Labor Management Relations Act, 1947, 29 U.S.C. 141, et seq.).

QUESTIONS PRESENTED.

The conclusions of the Supreme Court of California pose the following questions:

1. May a state court under the Taft-Hartley Act enjoin peaceful picketing of an interstate employer in a case where the Board has declined to exercise jurisdiction, when the court could not do so if the Board had not so declined?

2. If the answer to (1) is in the affirmative, may a state court do so on grounds the picketing though lawful under state law is an unfair labor practice under the Act?

3. If the answers to (1) and (2) are in the affirmative, may a state court do so where the alleged unfair labor practice consists of picketing for a union shop

by a union not "designated" by the Board when the Board has declined to hold a representation election and the State of California has no statutory procedure for doing so?

4. If the answers to (1), (2) and (3) are in the affirmative, does refusal by the Board's regional director to institute representation proceedings, without any attempt to review such refusal, vest the state court with jurisdiction in an unfair labor practice case?

STATEMENT OF THE CASE.

Plaintiffs below are partners engaged in the business of selling lumber and building materials. Defendants below are the San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36. About November 15, 1952, the unions requested a labor agreement with plaintiffs under one of the terms of which certain employees were required to make application for membership in the unions within thirty (30) days after hiring (R. 2).

The company refused to sign the agreement on the ground it would be a violation of the Act so to do before its employees or an appropriate unit thereof designated a union as their collective bargaining agent (R. 14). Thereafter, the unions commenced peaceful picketing at the company's place of business (R. 14). The picket carried a banner of moderate size upon which appeared the following: "A. F. of L.

Picket Millmen's Union 2020, Teamsters' Union 36 invites employees to join." (R. 32).

Plaintiffs brought an action on May 7, 1953 in the Superior Court of San Diego, California, a court of general jurisdiction, to enjoin defendants from picketing their place of business and for damages (R. 1). They alleged they were in interstate commerce, and that the contract requested of them would violate the Taft-Hartley Act since none of the unions had been certified by the Board.

Defendants by way of both demurrer and answer raised the question that the Superior Court had no jurisdiction since their activities, if illegal at all, were within the exclusive jurisdiction of the Board (R. 5). Defendants further, by way of answer, raised the issue that plaintiffs failed to exhaust their remedies under the Act (R. 8).

On the same day (May 7, 1953), plaintiffs mailed to the regional director of the Board a letter and petition requesting the Board to determine the appropriate unit for voting and to hold the representation election (R. 191 and 196). This the regional director refused to do. Plaintiffs did not appeal from this refusal.

Speaking of this refusal, the trial court in its opinion stated:

> "I have looked at these papers here and we talk about small business and we have these Congressional Committees, which their constituents think are going to protect small businesses, and I consider this lumber yard in Escondido would certainly be in the category of a small

business, and yet we have these federal agencies and when these small businesses file a petition with them to get relief in a certain case in which I think they would be entitled to relief, and some examiner up there perfunctorily turns the petition down and says that if you are not satisfied with the decision, you can appeal it to Washington, D. C., and by the time you get there, with all the matters pending back there, everybody would be dead and gone by the time they ever found the file." (R. 312).

* * * * * * *

"But in this case the petition was filed and I think the application was justified, and, as I have said, they were turned down by this examiner and he tells them they can apply to Washington if they are not satisfied." (R. 313).

* * * * * * *

"In any event, I think the petition was proper and personally, I think it should have been granted." (R. 313).

This opinion of the trial court was rendered on June 2, 1953, before *Garner et al. v. Teamsters, Chauffeurs & Helpers Local 776*, 74 S. Ct. 161, was decided.

Plaintiffs filed no unfair labor practices with the Board, their attorney testifying that:

"We were doubtful that any unfair labor practice by the unions was being committed in so far as the picketing of the plant of the plaintiff in this case was concerned." (R. 200-201).

The trial court found that company operations affected interstate commerce in that it sold over $250,000.00 worth of materials originating and manu-

factured out of California (R. 13); that the purpose of the picketing was to force execution of the foregoing labor agreement (R. 14), and that the Board refused to accept jurisdiction for the purpose of a representation election (R. 16). It made no finding relative to the failure of the plaintiffs to file an unfair labor practice charge. It applied the Taft-Hartley Act, awarded plaintiffs one thousand ($1,000.00) dollars damages and enjoined defendants from picketing and engaging in various other activities in order to require plaintiffs to discriminate with respect to conditions of employment by reason of membership or lack thereof in the unions, until one or more of the unions had been designated as the collective bargaining representative of plaintiffs' employees (R. 16-17). Since the State of California has no statutory administrative procedure for union designation, the trial court in effect forbade picketing until such time as the Board would assume jurisdiction, determine the appropriate unit, order the election and certify the results thereof.

The unions appealed to the District Court of Appeal, Fourth District, of the State of California, contending in substance that the Superior Court had no jurisdiction to enjoin activities contended to be an unfair labor practice under the Act; that the unions' requested contract and their conduct was entirely lawful and proper under California law; and that the Gammons had failed to exhaust their remedies before the Board.

The appellate court in a unanimous opinion on August 24, 1954 (127 A.C.A. 320) (R. 30) reversed

the trial court holding in substance that while the claimed objectionable conduct of the unions was defined in the Act as an unfair labor practice, there was no state statute making it unlawful and therefore the state court had no jurisdiction. The court relied on *Garner et al. v. Teamsters, Chauffeurs & Helpers Local 776*, 74 S. Ct. 161 (R. 35). The appellate court further concluded that since the Board had jurisdiction to determine plaintiffs' right to injunctive relief, the state court as such was without jurisdiction until plaintiffs exhausted their administrative remedy.

The Garmons thereupon appealed to the Supreme Court of the State of California.

The Supreme Court of California on December 2, 1955 (45 Cal. 2d 657) (R. 43) rendered a four to three decision holding in substance that where the board declines to exercise its jurisdiction because of its jurisdictional yardsticks, such action amounts to a declaration that national labor policy will not be jeopardized if a state court assumes jurisdiction and enforces the Act. The majority reasoned that otherwise Congress would be denying a remedy to employers over whom the board declines to exercise jurisdiction. Consequently, Congress intended to give state courts jurisdiction to enforce the Act in such circumstances.

The Supreme Court failed to make a distinction between exercising jurisdiction on the one hand in a representation case and on the other in an unfair labor practice case.

The strong dissent held the foregoing reasoning to be fallacious because:

> "(1) The national board and the powers granted to it are an integral part of the federal law and that law is not intended to have application in a situation where the board plays no part; it is inescapable that the federal law is to be administered by the board, not by the state courts. (2) The board in refusing jurisdiction as it has power to do, has in effect determined that the federal law should not apply in this case. (3) It is neither feasible nor fair to apply the federal law. (4) There has not been such a refusal to exercise jurisdiction by the board here as to justify the conclusion that the state court has jurisdiction." (p. 668).

SUMMARY OF ARGUMENT.

If respondents' business had fallen within the Board's jurisdictional yardstick, the court below would have had no jurisdiction in this case to grant injunctive relief or damages.

The same restriction is applicable where the Board declines to exercise its jurisdiction because:

1. The Act shows an intent to prohibit state assumption of jurisdiction without a cession agreement with the Board; and

2. The policy of the Act requires application of preemption doctrine with respect to industries affecting interstate commerce, since such attempted state regulation:

(a) conflicts with the pattern of regulation imposed by the Act;

(b) conflicts with the Act's policy of protecting concerted activities;

(c) destroys the "balance" of the Act; and

(d) causes intolerable confusion.

The assumption of jurisdiction by the states is not justified on the ground that otherwise labor relations will go unregulated in the field of interstate commerce because fundamentally such relationships should be the result of free and unrestrained collective bargaining unless gross inequities result in which event it more properly is a subject matter for consideration by Congress and not piecemeal approach by numerous state tribunals.

In any event, the court below was without jurisdiction because there had been a complete failure to exhaust existing detailed administrative remedies. It is a fallacy to assume that since a representation hearing had not been granted an unfair labor practice charge, if made, would be similarly treated.

ARGUMENT.

I. IF RESPONDENTS' BUSINESS HAD MET THE BOARD'S JURISDICTIONAL YARDSTICKS, THE STATE COURT WOULD HAVE HAD NO JURISDICTION IN THIS CASE.

If, instead of allegedly arising in an area from which the Board has temporarily withdrawn its jurisdiction, this case had arisen within the domain

marked out by the Board's present jurisdictional yardsticks, the jurisdiction of the court below both to grant injunctive relief and to award damage would have been preempted by the Act.

A. The court below would have been without jurisdiction to grant injunctive relief.

As to the jurisdiction of a state court to enjoin activity which is or may be an unfair labor practice under the Act, this case falls within the ruling of this Court in *Garner et al. v. Teamsters, Chauffeurs & Helpers Local 776*, 74 S.Ct. 161, as extended and applied in *Building Trades Council et al. v. Kinard Construction Company*, 74 S.Ct. 373.

In the *Garner* case, this Court held the Act precluded a state court from issuing an injunction on the basis of state law restraining picketing, even though that activity might have been an unfair labor practice under the Act. It made clear that where concerted activity may come within the orbit of unfair labor practices described in the Act, the procedures of the Board, whether applied or not, were intended to be exclusive.

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administra-

> tion of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law * * *" (*Garner* case, *supra*, at pages 165-166).

In the *Kinard* case, this Court made clear the application of the *Garner* rule to a situation where, like the present, a state court sought to enjoin concerted activity not because it was in violation of state law, but because it was found to be an unfair labor practice under the Act. The Supreme Court of Alabama had upheld the jurisdiction of an Alabama court to enjoin activity on grounds it was an unfair labor practice under the federal Act. This Court reversed *per curiam*, citing *Garner*.

The California Supreme Court recognized that the *Garner-Kinard* rule would have governed this case had it arisen under the Board's yardstick. The court stated:

> "The National Labor Relations Board has exclusive primary jurisdiction to prevent unlawful demands. (Weber v. Anheuser-Busch, Inc., 75 S.Ct. 480; Garner v. Teamsters, Chauffeurs & Helpers, etc., 74 S.Ct. 161; United Const. Workers v. Laburnum Const. Corp., 74 S.Ct. 833; Bethlehem Steel v. N. Y. State LRB, 67 S.Ct. 1026.) The purpose of the picketing was to

compel the company to sign an agreement which included a clause requiring the employer to encourage membership in the unions. In the circumstances here shown, under the Labor-Management Relations Act, this was an unfair labor practice." (*Garmon*, supra, at page 661).

B. The Court below would have been without jurisdiction to grant damages.

Petitioner submits the theory of the *Garner* and *Kinard* cases would also preclude the court below from granting recovery for general damages as an incident to injunctive relief, if this case had arisen within the Board's yardsticks.

Section 303(b) of the Act vests courts, apparently both federal and state, with jurisdiction to grant recovery for damages sustained by reason of acts specified in Section 303(a). Such acts are also unfair labor practices under Section 8(b), but there are several 8(b) unfair labor practices which are not included in 303(a). It is clear that Congress intended to permits courts to grant damages for certain named unfair labor practices and no others. Activity prescribed by Section 8(b)(2), which covers the instant case, is one type of activity which is not included in 303(a); therefore, it cannot form the basis of a damage suit in a state court.

The principle of the *Garner* case supports this conclusion. This Court made clear the important distinction, in this context, is not between public rights and private rights, but between "the legal rights or duties enforced through the administrative process

and those left to enforcement on private initiative in the law courts" (*Garner* case, *supra*, page 168).

For a state court to grant damages for all activity within the scope of the Act, is as much an interference with federal regulation as for a state court to grant an injunction. Exposure to liability for damages is as powerful a restraint on conduct as is a threat of injunctive relief. For this reason, the granting of damages is as regulatory, in the sense of affecting conduct, as the granting of injunction.

The situation is different, of course, where the state is confronted with activity such as violence, which states have traditionally regulated under their police power (*United Construction Workers v. Laburnum*, 74 S.Ct. 833). But the instant case is not that sort.

II. THE SAME RULES OF PREEMPTION ARE APPLICABLE WHERE THE BOARD FAILS TO ASSERT ITS COMPLETE JURISDICTION.

The broadest possible question presented by the instant case is whether the rules of federal preemption which this Court has evolved in recent cases are limited to that area within the Board's present jurisdictional yardsticks, or whether they are applicable to all employment relations which affect interstate commerce.

A. The Act shows an intent to prohibit State assumption of jurisdiction without cession from the Board.

Any suggestion that Congress intended the Board to be able to cede jurisdiction to the states by con-

tracting its jurisdictional yardsticks is negated by Section 10(a) of the Act which reads as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The proviso relating to cession was added in 1947 in order to resolve doubts cast by this Court in *Bethlehem Steel Co. v. N. Y. S. L. R. B.*, 67 S.Ct. 1026, on the power of the Board to cede jurisdiction to the states (1 *Legislative History of the Labor-Management Relations Act of 1947,* 500). In *Bethlehem,* a majority of this Court held a state labor relations board had no jurisdiction in a representation case involving foremen over which the Board had declined jurisdiction because of the policy of the latter that a unit of foremen was inappropriate for collective bargaining. The majority opinion reserved

the question of the effect of the Board's declination of jurisdiction for budgetary or other reasons. Three members of this Court, dissenting, did, however, express an opinion on the subject, saying:

> "If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations." (*Bethlehem, supra,* p. 1033).

Congress in the 1947 amendment to Section 10(a) wished to make clear that the Board could, under certain circumstances, cede jurisdiction to a state. Though obviously aware of the Board practice of declining jurisdiction and of the implications of the language of this court quoted immediately above, the framers of the 10(a) proviso provided only one method by which a state could assume jurisdiction in interstate commerce—cession by agreement with the Board.

Certainly this supports the presumption that other means of obtaining jurisdiction were excluded; and this presumption is further strengthened by the conditions imposed upon cession.

Section 10(a) spells out the conditions under which cession agreements can be entered into by the Board with the states. Under no circumstances can the Board cede jurisdiction to the states in the mining, manufacturing, communications and transportation industries, where firms or facilities within these categories have a substantial relationship to inter-

state commerce. In so far as other industries are concerned, it would appear that the Board has a *limited leeway* to cede jurisdiction via "an agreement" to the states over certain cases which affect interstate commerce. However, regardless of the industry, the Board may not cede jurisdiction over cases affecting interstate commerce if "the provision of the State * * * statute applicable to the determination of such cases by such agency is inconsistent" therewith. Thus, unless the state statute measures up to the standard of consistency, the Board, under the express terms of Section 10(a), is forbidden to enter into a cession agreement with a state.

Obviously, the reason why Congress included the consistency test was to insure uniform application of national labor policy within interstate commerce.

In this connection, the Senate Labor Committee which reported the Taft-Hartley in 1947 stated:

> "The provision which has been added to this subsection permits the National Board to allow State labor-relations boards to take final jurisdiction of cases in border-line industries (that is, border-line in so far as interstate commerce is concerned) provided the state statute conforms to national policy." (S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 26 (1947)).

Fully aware of the language and legislative history of Section 10(a), the Board to date has not found it possible to enter into a cession agreement with any state. The reason for this situation is that no state labor law corresponds closely enough to the federal law to satisfy the requirements of consistency. Cali-

fornia, for example, does not even have an approximation of the federal Act.

That this Court has agreed with this interpretation of Section 10(a) is indicated by its opinion in *Amalgamated Association etc. v. Wisconsin Employment Relations Board*, 71 S.Ct. 359, in which it said, at page 367:

> "When it amended the Federal Act in 1947, Congress * * * was well * * * aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board*, (1947) 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234, and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states."

In a footnote to this statement, the Court, after citing Section 10(a) of the Act as amended by Taft-Hartley, said:

> "A proviso of 10(a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess., 26 (1947). See also minority views to the same report, *id.*, pt. 2, 38, agreeing as to this feature of the legislation."

The text then continues:

> "Congress knew full well that its labor legislation 'preempts the field that the act covers inso-

> far as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative."

Similarly, in *Algoma Plywood & Veneer Co. v. W.E.R.B.*, 69 S.Ct. 584, at page 591 this Court stated the purpose of 10(a) was:

> "* * * to meet situations made possible by *Bethlehem Steel Co. v. New York S.L.R.B.*, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234, *where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction.*" (Citations omitted; emphasis added)

This has also been the Board's interpretation of 10(a). Thus, in *Punch Press Repair Corporation*, 89 NLRB 614, the board said:

> "Despite the Board's desire for the greatest possible comity with State boards, it lacks power under the present statute to divest itself of jurisdiction, except in conformity with Section 10(a) of the amended Act."

From 1948 onward the Congress, through its committees dealing with this problem, has clearly indicated its view that state regulatory action is foreclosed with respect to enterprises over which the Board has declined to assert jurisdiction. In 1948, the Joint Committee on Labor Management Relations, appointed pursuant to Title IV of the Act, commented on the desirability of making specific provi-

sion to permit state regulation of labor disputes over which the Board was refusing to assert its legal jurisdiction (S. Rep. No. 986, 80th Cong., 2nd Sess., Part I, pp. 30-31). The committee concluded that amendment of the Act would be necessary to enable the states to act in this area, and that, if such an amendment "would permit inconsistent regulations and as many different policies as there are states having labor relations Acts, the desirability appears questionable." Subsequently, bills were introduced in Congress to permit the states, without regard to Section 10(a), to exercise jurisdiction where the Board declines to act (S. 1264, 83rd Cong., 1st Sess., 99 Cong. Rec. 1845-1848 (1953); S. 2650, 83rd Cong., 2nd Sess., 100 Cong. Rec. 91, 100 Cong. Rec. 5194, 5284; S. Rep. No. 1211, 83rd Cong., 2nd Sess. (1954)). None has been enacted.

In its first session, the Eighty-third Congress rejected an amendment to the Act proposed by Senator Ives which would have provided, in this connection:

> "(2) Nothing in this Act shall be deemed to prevent or bar any agency, or the courts of any State or Territory, from assuming or asserting jurisdiction over labor disputes over which the Board has declined * * * to assert jurisdiction."

Senate Report No. 1211, known as the Smith Bill *(supra)*, was considered by the Senate Labor Committee of the Eighty-third Congress at its second session in 1954. The reports of both the majority and minority members were in agreement that, under

present law, state regulation in this area was precluded under the established principles of federal preemption. For this reason the bill was recommitted for the purpose of making specific provision granting power to the states, should a majority of the committee so desire (S. Rep. No. 1211, 83rd Cong., 2nd Sess. (1954); Cong. Rec. p. 2650). No such provision was made.

Both the language of Section 10(a) and its subsequent interpretation by Congress and the Board preclude, therefore, the possibility that states gain jurisdiction by the Board's refusal to act.

B. The design of the Act requires application of the same doctrines of preemption throughout interstate commerce.

Not only the language of Section 10(a), but also the general design of the Act and of the policies behind it argue for the application of the same standards of preemption throughout interstate commerce, regardless of Board inaction. State regulation in the area of Board retreat would infringe upon federal labor policy in at least four ways: (1) it would conflict with the pattern of regulation imposed by the Act (2) it would conflict with the Act's policy of protecting concerted activities (3) it would destroy the balance of the Act (4) it would cause intolerable confusion.

1. State regulation would conflict with the federal pattern of regulation.

The reasoning behind this Court's decision in the *Garner* case was that if states were permitted to enjoin activity regulated by the Act, conflicts would

likely arise between decisions of the state courts or boards and those of the Board—not only from differences in so-called "substantive" law, but also from differences in procedure, fact finding and remedies. The congressional policy of a uniform system of industrial law of necessity prevents a state from enjoining activity even though it might also be an unfair labor practice under the Act.

Similar policies apply in that area where the Board declines to exercise jurisdiction. In that area as well, decisions by state tribunals are likely to differ substantially from federal labor policy as administered by the Board, even though the state tribunals apply a similar or identical statute. Thus, even though the Board's failure to exercise jurisdiction removes one type of conflict, namely, between possible decisions of different tribunals as to the same case, another very important type remains: conflict between the *policy* of the Act and that of the state tribunal.

The instant case is an example of such a conflict. Section 8(b)(2) of the Act makes it an unfair labor practice for a union to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *" Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate in employment because of nonmembership in a union unless pursuant to a union shop agreement with a labor organization which:

> "* * * is the representative of the employees as provided in section 9(a) in the appropriate col-

lective bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with sections 9(f), (g) and (h)."

In the instant case, it is clear the various decisions below all proceeded on the theory that petitioner's activity was an unfair labor practice under Section 8(b)(2), because the union had not been "properly designated". But the State of California provides no statutory procedure for holding elections to determine employee choice of unions and their subsequent proper designation. Even were a court to institute such a procedure, it would certainly be substantially different from that conducted by the Board—an expert agency equipped to deal with the subtleties of labor relations.

The trial court's finding that the union did not represent the majority of the respondent's employees was based first on testimony by the employer's yard foreman, a relative of the Garmons (R. 125) who participated in a meeting of the employees at which the union was discussed; and on the fact that the union produced none of the employees to testify (R. 314-315).

The foreman's testimony was as follows:

"A. At that time we decided to leave it up to Bill and Stewart and Max, whether they wanted the union to enter.

The Court. Leave it up to who?

A. To Mr. Garmon (R. 120).

* * * * * * *

"Q. And that would mean the management?
A. Yes. (R. 129).

* * * * * * *

"Q. The question, I believe, that was pending to which an objection was made and overruled was: Did you discuss at the second meeting among yourselves as to whether or not you wanted to join the union?

A. Yes.

Mr. Whelan. Same objection as heretofore stated.

The Court. Overruled.

By Mr. Archer. Q. What was decided?

A. No. We decided we didn't want to." (R. 121).

There was no actual election let alone control of the election by an impartial agency; no outside observers of the election process; no determination of eligible voters; no guarantee of secret ballot; no opportunity to object to the method of election, if improper; no determination of an appropriate unit; and no certification—all of which safeguards would have been provided by the Board procedure.

The importance of these safeguards is nowhere more vividly illustrated than in the following extract of the opinion of the trial court:

"Now if there is any question about what transpired out there between the Garmons and their employees, there has been a lot of testimony introduced, but there have only been two employees brought in here. One was the foreman and one the gentleman sitting back there now. I think there are about six or seven others. If the unions

thought that the Garmons had coerced the employees not to sign up with the union, there is a good way to prove that under Section 2055 of the Code of Civil Procedure, as amended in 1951. That is the examination of an adverse party. It says:

> 'A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, member, agent, employee, or managing agent of any such party or person, or the agent, officer or employee of a municipal corporation which is a party to the action or proceeding, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses.'

Now certainly the employees of the Valley Lumber Company would come under that section as amended in 1951, and if there is any question as to whether or not the employers coerced these employees into not designating the union as their bargaining agent, they could have been brought in and examined under oath, and I would have made them answer and I would have made them answer truthfully, as far as I could.

But none of these employees have been brought in, and therefore I must assume that they weren't coerced." (R. 314-315.)

This Court has had occasion to point out the "implications of exclusiveness" which inhere in board certifications. *Weber v. Anheuser-Busch, Inc.*, 75 S. Ct. 480, at 485.

Furthermore, the State of California has no agency capable of making any determination as to what unit is "appropriate" for purposes of collective bargaining. And even were a court to undertake that function, it is quite probable its determination would be different from that of the Board.

Thus, to take just the example of this case, if states were permitted to enforce Section 8(b)(2), or even a state statute identical thereto, the results would almost certainly be at variance with federal policy, at least in a state which has no labor relations act or agency.

2. State regulation like that attempted by the Court below conflicts with the Act's policy of protecting concerted activities.

Section 7 of the Act reads as follows:

> "Employees shall have the right to self-organization, to form, join, of assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

It has been decided by this Court that Section 7 of the Act protects concerted activities, not only against employer action, but against state action as

well. *Hill v. Florida*, 65 S.Ct. 1373. In the case of employer action, the sole jurisdiction to protect concerted activities lies with the Board; but in the case of state action, protection is not, and indeed, cannot, be dependent upon the Board for enforcement. Therefore, there is no reason to limit protection of Section 7 activities as against the state to those cases which fall within the Board's jurisdictional yardsticks; and Congress has not so limited it.

Thus, in *International Union etc. v. W.E.R.B.*, 69 S.Ct. 516 this Court said of Section 7, at page 523:

> "In the light of labor movement history, the purpose of the quoted provision of the statute becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in *employment relations which affect interstate commerce*. No longer can any state, *as to relations within reach of the Act*, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert." (Emphasis ours.)

This position—that Section 7 activities are protected throughout the reach of the Act—was reiterated by this Court in its recent decision in *U. M. W. v. Arkansas Oak Flooring Co.*, 76 S.Ct. 559. In holding that "elimination of the Board" by non-compliance with Section 9(f), (g) and (h) "does not * * * elimi-

nate the applicability of the National Labor Relations Act, as amended," this Court said, at page 566:

> "The industrial relations between the company and its employees nonetheless *affect interstate commerce* and come within the field occupied by the National Labor Relations Act as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and unions are controlled by its applicable provisions and all courts, state as well as federal are bound by them." (Emphasis ours.)

In view of this Court's decision in *Garner* and *Kinard,* the meaning of this passage seems clear. The sense in which state and federal courts are "bound" by the Act is not that they are bound to enforce it, for this Court has held in *Kinard* that states have no such jurisdiction. On the contrary, they are bound in the sense that they may not infringe upon activities protected by the Act in the case of industrial relations which affect interstate commerce.

Thus, Professor Cox states of the *Garner* case:

> "* * * the only reason for excluding the application of state law was the danger that the state tribunal would reach a conclusion at variance with national policy by enjoining picketing which the NLRB might well have found not to be an unfair labor practice." (67 *Harvard Law Review* 1297, at page 1312.)

And this Court itself stated, at pages 170, 171 of the *Garner* case:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing, but only that *ascertained by prescribed processes* to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." (Emphasis ours.)

Whether or not an activity is protected is a question which Congress intended to leave to the Board.

Thus, in the instant case, petitioners' activity was deemed to be unprotected because its object was to obtain employer agreement to what was, under the circumstances, an agreement invalid under the Act. But petitioners contended in the trial court that their object was merely to organize the employees. Their members picketed carrying signs reading "A. F. of L. Picket Millmen's Union 2020, Teamsters' Union 36 invites employees to join." Yet the trial court, without any special experience in labor relations and without the investigatory and fact-finding procedures of the Board, speculated otherwise. It may be that if the case arose before the Board, it would have found the

facts to be in the petitioners' favor. This is an instance of the danger of permitting a state to find union concerted activity to fall within the prohibitions of the Act. In the instant case, the union is restrained from picketing for a union shop contract "unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof." (R. 25.) California provides no statutory procedure by which the union can become "properly designated".

The trial court, apparently, felt lack of designation was somehow the union's fault; the judge suggested

> "I think the proper procedure for the union would have been to cooperate in getting the National Labor Relations Board to get somebody down here to determine whether these employees wanted the union in question to represent them * * *" (R. 315-316.)

The unions are left, however, without any means of complying with the injunction in the absence of exercise of jurisdiction by the Board.

The decision of the court below, which proceeds on the theory the union's picketing was prohibited by the Act, endangers rights protected by it.

3. State regulation like that attempted by the Court below destroys the balance of the Act.

Even assuming that, by some coincidence, the court below reached the same conclusion the Board would

have reached, had it considered the case, still the principle upon which the court purports to act conflicts with the Act's design of imposing a balanced scheme of regulation upon labor relations affecting interstate commerce.

The Act constitutes a deliberate weighing of regulation against regulation to achieve a delicate balance of labor and management rights and duties. If state courts are permitted to enforce one part of the Act, on the theory that they gain jurisdiction by Board inaction, how can they be required to enforce the *totality* of the Act in the absence of necessary machinery to accomplish this result?

4. State regulation like that attempted by the Court below causes intolerable confusion in determining jurisdiction.

A fourth reason why Congress intended the same standards of preemption to apply where the Board declines as where it exercises jurisdiction is the confusion which would result from making state action dependent upon the Board's changing jurisdictional yardsticks. The Board has made two general declarations of yardstick criteria, and has changed its mind on the interpretation and application of those yardsticks dozens of times.* Were state jurisdiction to depend upon Board yardstick policy, parties would

*For one example, see the excellent discussion of the Board's vacillation as to the taxicab industry in *New York State Labor Relations Board v. Wags Transportation System*, 33 LRRM 2855 (1954) (NYS).

be subject to one law one month and another law the next; the stability in labor relations which Congress intended to foster would be destroyed. This position was so well stated by a Michigan court that part of its opinion is worth calling to the attention of this Court:

> "If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case existing at the time of its commencement will continue until its final decision." (*Universal Car Co. v. Association of Machinists,* 35 LRRM 2087 at page 2098. (Mich. Court of Appeals, 1954.)

III. ASSUMPTION OF JURISDICTION BY THE STATES IS NOT JUSTIFIED UPON THE GROUND THAT OTHERWISE LABOR RELATIONS WILL BE UNREGULATED.

Those who would support state regulation often contend that the states must have the right to regulate the area in interstate commerce in which the Board does not act because otherwise labor relations are not regulated by government in that field. Yet this argument overlooks the whole basis of the American economy and the justification of the Taft-Hartley Act.

Labor-management relations in the United States and indeed, the economy of this country, rest upon the foundation of competition and free collective bargaining. To the extent that Congress regulated that field by the Taft-Harley Act it modified the freedom of action of the parties, but it certainly intended that government intervention proceed no further. In the absence of the effectuation of the Taft-Hartley Act by the board, the design of Congress preserved the free collective bargaining upon which the Act itself rested.

As Senator Taft himself said:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions." (93 *Cong. Rec.* 3835, 2 Leg. His. LMRA 1006.)

Indeed economic competition between unions and employers is one kind of solution of the problems of labor relations. It pre-dated the Taft-Hartley Act. It is the laissez faire of labor relations: the self-regulation of free competition.

Intervention by statute upsets the balance which results from the free working of these economic forces. Hence Congress, after the full presentation of the views of labor and management, designed a bi-lateral pattern of intervention, imposing rights and liabilities both upon employers and unions. The dual

pattern of regulation is delicately and finely adjusted, consisting of inter-related rights and duties.

To effectuate these rights and duties, Congress set up a Board with a specialized technique of control. Since the mechanism was of a single piece and the design whole and complete, it gave the Board exclusive power to apply or not to apply it in the field of interstate commerce.

If the mechanism of government regulation was *not* to be used by the Board, because in its judgment the working of the free competitive system in interstate commerce was not to be disturbed, the field remains free for the self-regulation of economic forces. In only two possible situations did Congress deliberately permit government intervention by states because of the peculiar circumstances there involved (Sec. 10a, 14b). It did this in no other, preserving the integrity of the instrument of control.

The piecemeal intervention of states, either to enforce federal rights or liabilities, as designed in the Act, or to impose their own regulations, would upset the balance of economic forces which Congress meant to preserve. The undesirability of state intervention when the Board decides to use and enforce the regulations of the Act is manifest; yet the effect of such intervention is the same when the Board declines to use the statutory regulation and to permit, instead, the self-regulation of free competition.

In any event, if self-regulation in the field renounced by the Board produces questionable social results, several legislative courses of action remain open.

The Board itself may fulfill its contemplated role by extending its activity into the whole field of interstate commerce rather than confining itself to the narrow area it now occupies. If the Board does not do so, and some need for statutory regulation remains, the states may adopt labor relations acts sufficiently similar to the federal Act to comply with Section 10(a). In such event the statutory regulation will accord with the national regulations established by the Act itself. If neither of these legislative steps suffice, Congress may enact such laws as it determines necessary; ultimately, the responsibility for an abridgement of the field of free enterprise and competition, beyond the present statutory limitations, rests with Congress and not with this Court.

IV. THE COURT BELOW WAS WITHOUT JURISDICTION IN THIS CASE BECAUSE THE ACTION OF THE REGIONAL DIRECTOR DID NOT CONSTITUTE REFUSAL BY THE BOARD TO ASSERT JURISDICTION OVER AN UNFAIR LABOR PRACTICE.

Even if the contentions above made are found erroneous and a state court may act in an area where the Board has declined jurisdiction, there was no such declination here.

After a representation petition was mailed to the regional office of the Board on the same day the instant case was instituted, and was rejected because of the jurisdictional yardsticks, not only did respondents not exercise the opportunity to appeal from the refusal of the regional director to issue a notice of representation hearing but in fact never filed an

unfair labor practice charge. The latter failure was admittedly the result of the conviction that regardless of the question of exercise of jurisdiction no unfair labor practice had in fact been committed (R. 200-201.)

Mr. Waddell, a law associate of counsel for the plaintiffs below testified:

> "We were doubtful that any unfair labor practice by the unions was being committed insofar as the picketing of the plant of the plaintiff in this case was concerned." (R. 200-201.)

Even if respondent had appealed from such determination of the regional director and the regional director's decision had been affirmed, still the Board's declination of jurisdiction in this case would not be clear. This is so for two reasons. First, the appeal from a regional director's dismissal of an unfair labor practice charge is heard by the general counsel rather than the Board as in a representation case. It not infrequently happens that these two bodies reach different conclusions. *Haleston Drug Stores v. NLRB, Smith, dba A-1 Photo Service v. NLRB,* 187 F. 2d 418 (C.A. 9) (1951) Cert. Den. 72 S.Ct. 29. Second, the charge most likely would have been dismissed because there was no unfair labor practice and the conduct of the unions would be protected activity. (cf. *Waddell* testimony, *supra.*)

In addition, this Court has frequently held that before a party may resort to the courts he must exhaust whatever administrative remedies are available to him. *Meyers et al. v. Bethlehem,* 58 S.Ct. 459. That

principle is applicable here. If this Court is to hold that states may act where the Board declines to act there must be some final and certain indication of such declination, together with the reasons therefor. Finally, the mere refusal by an intermediate official to assert jurisdiction in a different type of matter does not meet that standard. This argument is so well set forth in the opinion of the dissenting judges below that lengthy discussion of it here is unnecessary. 45 Cal. 2d 657 at pp. 675-676.

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be reversed.

Dated, September 24, 1956.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 785

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENTS IN OPPOSITION

CITATIONS AND OPINIONS BELOW

We think it proper for clarification of the record to point out that the opinion set out in Appendix A to the petition is not the opinion of the trial court with respect to the order involved in this case. It is the opinion of the Honorable L. N. Turrentine rendered on May 18, 1954, with respect to an application for an

injunction *pendente lite*. The oral opinion of Judge Hewicker ordering the judgment appealed from is unreported but may be found in the record in the Superior Court Reporter's Transcript, page 372 to page 389.

QUESTIONS PRESENTED

The respondents disagree with the petitioners' statement of questions presented.

Respondents believe that only two questions are properly presented by the petition and the record. Somewhat restated in what we believe to be the interest of precision, they are as follows:

1. May a state court enjoin coercive activity constituting an unfair labor practice carried on against an employer whose business affects commerce when the National Labor Relations Board has refused to exercise jursidiction over the case on the ground that the purposes of the National Labor Relations Act would not be effectuated by its intervention?

2. If the answer to Question 1 is in the affirmative, does a refusal by the Board's Regional Director, pursuant to authority lawfully delegated to him by the Board, to exercise jurisdiction in the particular case in connection with representation proceedings therein, which refusal has become final, constitute such a refusal by the Board, where it would clearly have been futile to appeal to the Board or to file an unfair labor practice charge?

Petitioners assert that two other questions are presented. One is petitioners' Question 2 which reads as follows:

> "If the answer to (1) is in the affirmative, may a State Court do so on grounds the picketing though lawful under State Law is an unfair labor practice under the Act."

This question is not present in the case because the trial court did not enjoin the conduct of petitioners on the ground that it was an unfair labor practice under the National Labor Relations Act, nor did the Supreme Court of California hold the conduct lawful or affirm the injunction on the ground that the conduct was an unfair labor practice under that Act.

Petitioners also assert that there is a question presented which they designate as their Question No. 3. It is as follows:

> "If the answers to (1) and (2) are in the affirmative may a State Court do so where the alleged unfair labor practice consists of picketing for a union shop by a union not 'Designated' by the Board when the Board has declined to hold a representation election and the State of California has no procedure for doing so?"

The question is not presented by the record for the reason, among others, that the State Court did not enjoin the union on the ground that it had not been "designated" by the Board, but rather on the ground that it had not been "designated" by the employees. This asserted question, moreover, was not presented to any of the courts below in any form.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS, INVOLVED

Petitioners assert that the statutory provisions involved are the Taft-Hartley Act, 29 U. S. C., Sec. 141 et seq., (61 Stat. 136) but they do not set forth any provisions of this statute. Also involved in petitioners' asserted Question No. 4 are certain of the regula-

tions issued by the National Labor Relations Board, published in 13 F. R. 3090 and 16 F. R. 1934, specifically those contained in Title 29 of the Code of Federal Regulations, Sections 6 and 101.17.

While the decision below does not raise any constitutional questions, the rule contended for by petitioners would raise serious questions under Article I, Section 8 of the United States Constitution, and the Fifth and Tenth Amendments to the Constitution.

Pertinent portions of these Constitutional provisions, statutes, and regulations are set forth in an Appendix.

STATEMENT OF THE CASE

Petitioners' statement of the case needs to be corrected in one important respect, and supplemented in certain other respects.

In their statement of the case, petitioners assert that the trial court enjoined them from carrying on the activities involved "until one or more of the unions had been designated by the Board." There is no citation to the record for this statement. The decree itself simply used the phrase "properly designated." It is not the law that a union can be properly designated only by the National Labor Relations Board. To the contrary, in the terminology of the National Labor Relations Act, it is designated by the employees and the Board does nothing more than "certify the results" of elections. (Title 29 U. S. Code, Sec. 159, Subdivisions (a) and (c).) None of the courts below interpreted the decree to have the meaning now attributed to it by petitioners. The briefs below show no indication that any of the parties did.

The trial court found that the respondents were engaged in the business of selling lumber and other building materials in the

City of Escondido and elsewhere in the County of San Diego, and that in excess of a quarter of a million dollars of such materials originated outside of California. The testimony of respondent William Garmon, the only direct testimony on the subject, was that the business was retail in nature. (Superior Court Reporter's Transcript, pages 25 and 26). He also testified that the total purchases of the business were over half a million dollars, of which about $200,000.00 originated out of state. (Superior Court Reporter's Transcript, p. 27). (As this was the only testimony on the subject the finding of the Trial Court as to the amount originating out of state is apparently an inadvertent error). There appears no other connection with interstate or foreign commerce. The Supreme Court of California noted that in any event no more than $250,000.00 worth of goods came from interstate commerce and that therefore a request for a review of the action of the Regional Director would have been futile in the light of the Board's rulings and statement of policy referred to in the opinion. (Petition for Certiorari, p. 32).

ARGUMENT

I. THE DECISION OF THE COURT BELOW ON THE FIRST ASSERTED QUESTION WAS CORRECT AND RAISES NO SUBSTANTIAL QUESTION FOR THIS COURT.

A. *The decision of the court below follows principles announced by this Court.*

The decision of the Supreme Court of California is in full accord with the principle enunciated by this Court in *Bethlehem*

Steel Co. v. New York Labor Relations Board, 330 U. S. 767, 774, 91 L. ed. 1234, 1246, in which the Court pointed out:

> "However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, [citation], or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distant segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal upervision awaits federal administrative regulation, [citations]. The states are in those cases permitted to use their police power in the interval."

It is true that the Court refrained from expressly applying this to action of the National Labor Relations Board in refusing to exercise jurisdiction in certain types of cases "for budgetary or other reasons." This undoubtedly was the only proper course for the Court to take, as the holding of the case was that the Board had in effect regulated the matter and in a manner contrary to the rule the state board sought to enforce, so that the question of a refusal to act at all was not before the Court. The application of the principle to the present case is, however, plain. The Board has in this case decided that the controversy falls into a "separate or distinct" segment of the matter covered by the federal statute and that it chooses not to apply the federal regulation to that segment.

Petitioners make much of the fact that three dissenters in the Bethlehem Steel case disagreed with the "suggestion" that

this might be the appropriate result. The dissenters, however, took this position in urging an even wider scope to the power of the states, and, moreover, considered only a refusal induced by budgetary reasons. In the present case the National Labor Relations Board declined to act, not for budgetary reasons, or because it is on "short rations," but because it found that the purposes of the National Labor Relations Act would not be effectuated by its intervention. In effect, it found that the impact of the situation on interstate commerce is too small to justify action by the Federal Government. Such a ruling necessarily implies that the interest of the Federal Government is likewise too slight to justify excluding action by the states, and if Congress has by implication authorized the Board to make and act on such a finding it must have authorized the implication inherent in it.

B. *The decision involves no problem of conflict with any federal statute.*

The decision of the Supreme Court of California in the present case was the only one which could have avoided all problems that involve serious constitutional or federal questions. A ruling that would deprive the states of power to act in a case in which the federal interest was too slight to justify federal action would involve a drastic and needless limitation on the power of the state and such great injustice to those affected that the intervention of this Court might perhaps be necessary. The contrary ruling avoids this problem, and raises no other calling for the intervention of this Court.

Clearly, it is not necessary for this Court to intervene in order to carry out any intention of Congress. It would obviously be

monstrous to hold that there is an area of law in which no party is entitled to relief even for conduct which is admittedly unlawful by the federal law, and, as the Supreme Court of California held, it cannot reasonably be thought that Congress intended any such unreasonable result.

Indeed, if Congress had expressly provided that there should be such an area of anarchy, there would be, to say the least, a serious question whether the power to enact such legislation is conferred by the Constitution. Such power is not conferred by the express terms of the Commerce Clause itself, for respondents are not engaged in interstate or foreign commerce, nor would it be authorized by implication or by the last clause of Article 1, Section 8, of the Constitution, for such legislation would not be "necessary and proper" to protect interstate commerce or to carry into execution any power conferred by the Constitution. (As to the power of Congress see the statement in *Bethlehem Steel Co.* v. *New York Labor Relations Board, supra,* at 330 U. S. 772, 91 L. ed. 1245.) If such power is not conferred by the Constitution it of course is withheld under the Tenth Amendment. In addition, such legislation, had it been passed, might well contravene the due process clause of the Fifth Amendment to the Constitution. All of these problems are avoided by the decision of the California Supreme Court to the effect that Congress did not intend to and did not enact any legislation requiring any such result.

Any possible conflict with any rights created by the National Labor Relations Act is eliminated by the fact that the conduct enjoined is, according to the holding of the court below and the contention of petitioners, positively forbidden by the national law. Thus the problem inherent in several cases, notably *Amal-*

gamated Association v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 95 L. ed. 364, relied upon by petitioners, is not present in the case.

Moreover, Congress could not have intended by forbidding conduct because of its injurious nature to have immunized it in cases in which the Federal interest was slight.

Petitioners also assert that the decision below is contrary to the intent of the provision of Section 10(a) of the National Labor Relations Act which gives authority to the Board to cede jurisdiction over certain industries to local state boards. This authority was by its plain terms given to permit the Board to cede jurisdiction over entire industries in particular states. As appears, for example, from the very instance which gave rise to it (See *Bethlehem Steel Co.* v. *New York Labor Relations Board*, *supra*), it applies to cases in which the Board would otherwise exercise jurisdiction. Obviously, this type of cession involves entirely different considerations from those applicable to cases in which the Board would in any event decline or has in fact declined to exercise its jurisdiction because of a determination that the impact of the situation on interstate commerce was not sufficient to justify its action. Restrictions properly applicable to the one situation cannot be supposed to have been intended by Congress to apply to the other.

There is no possible way in which the decision below can contravene any actual or supposed policy or intent of Congress.

C. *The decision involves no problem of conflict of jurisdiction.*

As the Supreme Court of California pointed out, the result

called for by petitioners is not necessary to protect the jurisdiction of the federal agencies. After the National Labor Relations Board has actually refused to entertain jurisdiction, there can be no question of a conflict between the law enforcement agencies of the state and those of the Federal Government.

D. *The decision presents no question of uncertainty in the law.*

Petitioners suggest that the state courts should be denied the power to act because otherwise there will be uncertainty in the law. This is so obviously incorrect that it does not present a substantial question. The decision below avoids, rather than creates, uncertainty.

It is often exceedingly difficult to ascertain whether a business "affects" interstate commerce, and the federal courts have been saved much labor and worry on this subject by the fact that the National Labor Relations Board has declined to act in many marginal cases. The National Labor Relations Board has now laid down very clear-cut and definite standards as to what cases it will accept jurisdiction over. An actual order of the Board or its duly authorized agencies declining jurisdiction in the particular case is even more definite and easily ascertainable. It follows that a holding in accordance with the contentions of the petitioners would result not only in a most unjust and unreasonable result but would in addition create enormous uncertainty in the determination of the jurisdiction of courts over particular sets of facts. Such uncertainty as to a question of jurisdiction, of such a nature that it could be ultimately resolved only by this Court, would be of the most vicious kind. All this is avoided by the decision of

the Supreme Court of California in this case.

II. THE SECOND QUESTION ASSERTED BY PETITIONERS IS NOT PRESENT IN THE CASE.

The state courts did not enjoin the coercive activities of the petitioners on the ground that though lawful under state law they were an unfair labor practice under the National Labor Relations Act. To the contrary, it appears from the opinion below that similar conduct was held unlawful in California in *Park & Tilford Import Corp.* v. *International Brotherhood of Teamsters,* 27 Cal. 2d 599, 165 Pac. 2d 891, which was decided at a time when no conduct of a union was stigmatized by the National Labor Relations Act as an unfair labor practice.

The court below followed the Park & Tilford case and *James* v. *Marinship,* 25 Cal. 2d 721, 155 Pac 2d 329, and did not purport to base its decision on the fact that the conduct enjoined was an unfair labor practice. Respondents at all stages of the proceedings contended that the conduct was not an unfair labor practice.* The court below, though stating that it was one, cited that fact, at most, as negating a privilege, and rested its decision on common-law principles.

The asserted fact that the conduct was an unfair labor prac-

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*The Brief of Respondents before the District Court of Appeal refers (page 12) to the briefs in two other cases in the same court in which this position was specifically taken. Our brief filed in the Supreme Court of California entitled "Answer to Memorandum of Appellants after Oral Argument" (apparently omitted from the record filed by petitioners) takes the same position. (pages 5 to 9.)

tice serves to emphasize the monstrosity that would be achieved by holding that the state court had no power to act. Congress cannot have intended to create a situation where no law can be enforced because two laws are being violated.

Even if the state court had acted on the ground that the picketing, though lawful under the state law was an unfair labor practice under the Act, still no substantial federal question would be presented. If the court had chosen to take this position, it would have been saying that as applied to such cases it would model its law upon the federal law. This raises no federal question but to the contrary eliminates any conceivable conflict with the policy of Congress. It has never been held that a state may not, if it chooses, model its law as applied to a particular situation upon the federal law, nor has it been held that it may not do this by judicial decision rather than by statute.

III. THE THIRD ASSERTED QUESTION IS NOT PRESENT IN THE CASE.

The record is devoid of any showing that the conduct enjoined consisted of picketing for a union shop by a union not "designated" by the National Labor Relations Board. The facts in this regard have already been stated. For this reason there is no need to consider further petitioners' asserted Question No. 3.

IV. THE PETITIONERS' ASSERTED QUESTION NO. 4 RAISES NO SUBSTANTIAL QUESTION FOR THIS COURT.

The petitioners' asserted Question No. 4 relates to whether the refusal of the Board's Regional Director to institute represen-

tation proceedings constitutes a refusal by the Board to act. We submit that it does, for the reasons stated in the opinion of the Supreme Court of California. It is not questioned that the action of the Regional Director became final when not appealed from, and that it constituted a final disposition of the case by or under the authority of the Board, to the same extent that a final decision by the full Board would have. The regulations set out in the Appendix leave no room for doubt on these points. Moreover, we submit that this question is not of sufficient importance to justify the intervention of this Court. If the Board, through its authorized agencies, has in fact refused to act, its jurisdiction needs no protection.

V. THE QUESTIONS ASSERTED BY PETITIONERS HAVE NOT GIVEN RISE TO A NOTEWORTHY AMOUNT OF LITIGATION OR DISCUSSION.

Petitioners have asserted that the decision below conflicts with certain prior decisions and raises points that have given much trouble to courts and writers. This is not correct.

It is apparent from petitioners' own analysis, contained in Exhibit E to the petition, that very few of the cases said by them to pass upon the point disagree with the decision below. Moreover, not one of the decisions said by petitioners to support their position is that of an appellate tribunal of a state of the United States and only one is the decision of a United States Court of Appeals. That one is *Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 Fed. 2d. 659. Even in that case, the question was not squarely presented nor squarely decided. According to the opinion of the court the principal question presented to it was that of

res judicata and it decided the case upon the basis of that doctrine. The statement quoted by petitioners from the opinion is apparently an afterthought, not fully presented or fully considered, and appears to be no more than a dictum.

Some of the other authorities said by petitioners to contain relevant discussion are not available to us, being trial court decisions or decisions of state labor relations board whose full reports we do not have. It would serve no useful purpose here to analyze in detail those that are. It may be said that for the most part the cases cited involve various aspects of the decision of this Court in *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U. S. 485, 98 L. ed. 228, 74 S. Ct. 161, but neither involve in their factual situations nor contain any discussion in their opinions of any of the four questions which petitioners assert are involved in this case. Of those few that do refer to a question raised in this case, most merely refer to them only in passing.

Likewise, of the text authorities cited, so far as they are available to us, virtually none advert to or discuss any of these questions.

Therefore, contrary to the impression sought to be given in the petition, the problems in the present case are ones which have given rise to comparatively little litigation (and almost no decisions in favor of petitioners) and have received small notice in the very extensive literature on the general subject of the problems inherent in the Garner case.

CONCLUSION

Much of the discussion in the petition is based upon the assumption that the conduct enjoined in the present case was enjoined because the National Labor Relations Board had not "designated" the union as the bargaining agent of the employees. When this misapprehension is cleared away we remain with little more than the bare contention that Congress intended such conduct, though too injurious to be permitted when large employers are involved, to be completely immunized from restraint in cases that do, indeed, affect interstate commerce, but not very much. Such a result would create a special class of cases, treated differently both from those over which the Board accepts jurisdiction and from those over which it has none and would deprive employers of moderate size and their employees of a protection found by Congress to be necessary for large ones. It would create a most serious and unjust lack of uniformity with any other law, and one which cannot be supported as being in accord with any legislative or public policy.

Congress by making conduct an unfair labor practice meant to prevent it, not to immunize it from restriction.

The decision of the Supreme Court of California was plainly correct for the reasons stated in the opinion, and does not raise any problems calling for the intervention of this Court. The petition should be denied.

Respectfully submitted,
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APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 8

The Congress shall have Power . . .

. . . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

AMENDMENTS TO THE CONSTITUTION

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES

National Labor Relations Act, Section 10 (Title 29 U. S. Code, Section 160)

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

National Labor Relations Act, Section 9 (Title 29 U. S. Code, Section 159)

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a

unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

. . . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

. . . . .

REGULATIONS

Title 29 United States Code of Federal Regulations, Section 6

Under the general supervision and direction of the General Counsel the Regional Directors have the following authority:

. . . . . .

. . . . .

(c) To decline to issue a complaint or a Notice of Hearing, subject to the right of the aggrieved party, in the case of a complaint, to appeal to the General Counsel, and in the case of a

Notice of Hearing in a representation case, to appeal to the Board. . . . .

Title 29 United States Code of Federal Regulations, Section 101.17

(a) Upon receipt of the petition in the Regional Office, it is docketed and assigned to a member of the staff, usually a Field Examiner, for investigation. He conducts an investigation to ascertain . . . (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, . . .

. . . . .

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification, the showing of representation among the employees is insufficient to warrant an election under the 30 percent principle stated in paragraph (a) of this Section. .

(c) For the same or similar reasons the Regional Director may request the petitioner to withdraw its petition. If, despite the Regional Director's recommendation, the petitioner refuses to withdraw the petition, the Regional Director then dismisses the petition stating the grounds for his dismissal and informing the petitioner of his right of appeal to the Board in Washington, D. C. The petitioner may within 10 days appeal from the Regional Director's dismissal by filing such request with the Board in Washington. After a full review of the file with the assistance

of its staff, the Board may sustain the dismissal, stating the ground of its affirmance, or may direct the Regional Director to take further action.

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IN THE

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OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

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Respondents.

On Writ of Certiorari to the Supreme Court of California

RESPONDENTS' BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

On Writ of Certiorari to the Supreme Court of California

RESPONDENTS' BRIEF

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Petitioners assert that the statutory provisions involved are the National Labor Relations Act, Title 29, U. S. Code, Section 151, et seq., (61 Stat. 136), but they do not set forth any provisions of this statute. Also involved in petitioners' asserted Question No. 4 (Our Question No. 2, *infra*) are certain of the regulations

issued by the National Labor Relations Board, published in 13 F.R. 3090 and 16 F.R. 1934, specifically those contained in Title 29 of the Code of Federal Regulations, Sections 6 and 101.17, and certain official announcements of the National Labor Relations Board stating under what circumstances it will exercise its jurisdiction.

While the decision below does not raise any constitutional questions, the rule contended for by petitioners would cause serious questions under Article I, Section 8, of the United States Constitution, and the Fifth and Tenth Amendments to the Constitution.

Pertinent portions of these Constitutional provisions, statutes, and regulations are set forth in Appendix A to this brief.

QUESTIONS PRESENTED

Respondents believe that only two questions are properly presented by the petition for certiorari and the record. Somewhat restated in what we believe to be the interest of precision, they are as follows:

1. May a state court enjoin coercive activity constituting an unfair labor practice and a tort under state law carried on against an employer whose business affects commerce when the National Labor Relations Board has refused to exercise jurisdiction over the case on the ground that the amount of business done by respondents affecting interstate commerce was insufficient for the Board to assert jurisdiction?

2. May the state court enjoin such conduct where the Board has officially announced that it will decline to exercise its jurisdiction over such employers and the Board's Regional Di-

rector, acting under authority duly delegated to him, has actually dismissed a representation proceeding on that ground, and where in the light of the Board's pronouncement it would obviously have been futile to appeal his decision to the Board or to file unfair labor practice charges?

These two questions are in substance petitioners' Questions 1 and 4.

Petitioners in their petition and in their opening brief assert that two other questions are presented. One is petitioners' Question 2 which reads as follows:

> "If the answer to (1) is in the affirmative, may a State Court do so on grounds the picketing though lawful under State Law is an unfair labor practice under the Act?"

This question is not presented in the case because the trial court did not enjoin the conduct of petitioners on the ground that it was an unfair labor practice under the National Labor Relations Act, nor did the Supreme Court of California hold the conduct lawful under the state law or affirm the injunction on the ground that the conduct was an unfair labor practice under that Act.

Petitioners also assert that there is a question presented which they designate as their Question No. 3. It is as follows:

> "If the answers to (1) and (2) are in the affirmative may a State Court do so where the alleged unfair labor practice consists of picketing for a union shop by a union not 'designated' by the Board when the Board has declined to hold a representation election and the State of California has no statutory procedure for doing so?"

This question is not presented by the record, for the reason, among others, that the state court did not enjoin the union on the ground that it had not been "designated" by the Board, but rather on the ground that it had not been "designated" by the employees. Also, it is not true that the State of California has no procedure for determining questions of representation. There is, it is true, no statutory election procedure, but an election is not the only method of determining questions of representation, and moreover, there is no showing that the trial court could not or would not have held an election had it been asked to do so. This asserted question was not presented to any of the courts below in any form.

All of the questions asserted by petitioners are questions of the *power* of the state to issue any injunctive relief, and not of the correctness of its decision on the merits that such conduct should be enjoined.

STATEMENT OF THE CASE

The record in the present case reveals a particularly flagrant case of an attempt to compel employers to sign a contract with a union which does not represent the employees and thereby force the employees into the union, wholesale and against their wills.

Respondents are two brothers and the son of one of them engaged as partners in carrying on a retail lumber business in Escondido, California. (R. 82.). They have eight employees. (R. 82.) One of petitioners is the San Diego Building Trades Council, an organization of labor unions in the building trades. (R. 13, 225.) Another is Building Material and Dump Truck Drivers Local No. 36, a local of the International Brotherhood of

Teamsters. (R. 300.) The third is Millmen's Union, Local 2020, a local union of the International Brotherhood of Carpenters and Joiners. (R. 256.)

The petitioners presented no evidence that any of these employees had designated any of the unions as his collective bargaining representative, and none of them had been designated or was the collective bargaining representative of the employees. (Paragraph IV of Findings of Fact, R. 14.) Nevertheless, the petitioners sought to compel the respondents to sign a contract which would have constituted them the representative of these employees and which contained, among other things, a union shop provision. (Paragraph IV of Findings of Fact, R. 13.)

The Supreme Court of California, in accordance with the unchallenged findings of the Trial Court, summarized the attack of these organizations upon respondents and their eight employees as follows:

> "The intent of the unions was not to induce the employees to join one of them, nor to provide education or information as to the benefits of unionization. The only purpose was to force the company to execute the agreement or suffer destruction of its business. In addition to picketing, union agents followed the company's trucks and threatened persons about to enter its place of business with economic injury. By this conduct, and the use of language calculated to instill fear of such injury, the unions induced building contractors to discontinue their patronage of the company, with consequent damage to the business amounting to $1,000.00." (R. 45.)

This statement is based on and summarizes Paragraphs VII,

VIII and IX of the Findings of Fact. (R. 14, 15.)

The decree of which petitioners complain does not prohibit them from seeking to invite the employees to join the union but only from seeking to injure respondents for a purpose concededly unlawful. (R. 25.)

The Supreme Court of California held that under the circumstances presented, such activities "were not privileged under the California law" (R. 52) and therefore were enjoinable if, as the court held, the state courts had jurisdiction. It is this question of jurisdiction which is now presented to this Court.

The record shows also that the respondents were denied relief by the National Labor Relations Board, which declined on policy grounds to exercise its jurisdiction in the case. (R. 16, 191; Exhibit 5, R. 192, 196.)

Petitioners do not state the reasons given for the refusal of the National Labor Relations Board to take jurisdiction. The reason is set forth in the opinion below but for the convenience of the Court it will be set forth again here. It was that "in view of the scope of the business operation involved it would not effectuate the purposes of the National Labor Relations Act to institute further proceedings . . ." (R. 49; Exhibit 5, R. 192, 196.) This ruling followed a letter informing respondents that such action was contemplated because "The amount of business done by Valley Lumber Company in interstate commerce is insufficient for the Board to assert jurisdiction on the basis of previous Board decisions." (R. 49; Exhibit 5, R. 192, 196.)

This refusal was in accordance with the announced policy of the Board in cases involving employers such as the respondents. (R. 16; Exhibit 5, R. 192, 196.) The Board's announcement of this policy is set out in Appendix B to this brief. The Supreme

Court of California in accordance with the trial court's finding (R. 13) noted that in any event no more than $250,000.00 worth of goods per year came from interstate commerce and that therefore a request for a review of the action of the Regional Director would have been futile in the light of the Board's rulings and statement of policy referred to in the opinion. (R. 49.) No other connection with interstate commerce appears from the record.

It is necessary to correct an assertion in Petitioner's Opening Brief (p. 4) that respondents alleged they were engaged in interstate commerce. This statement is wholly contrary to the record. After setting forth the facts about purchases of goods coming from out of state, the pleadings and findings merely state that the business of the petitioners "affects" interstate commerce. (R. 2, 16.)

In their statement of the case, petitioners assert that since the State of California has no statutory administrative procedure for union designation, the decree of the trial court, in effect, enjoined picketing until such time as the Board should assume jurisdiction, determine the appropriate unit, order the election, and certify the results thereof.

This is both incorrect and immaterial.

It is immaterial because the questions presented to this Court, as stated both by petitioners and respondents, do not turn upon the precise *scope* of the decree entered by the trial court (or even the propriety, as a matter of substantive law, of granting any relief at all), but rather upon the jurisdiction of the state courts. No question of the scope of the order was presented to or decided by any lower court.

It is untrue because the decree did not have the effect so attributed to it. The decree simply used the phrase "properly des-

ignated." (R. 25). In the terminology of the National Labor Relations Act (Section 9(a) and 9(c)), a union is designated by the employees and the Board does nothing more than "certify the results" of elections. (Title 29, U.S. Code, Sec. 159, Subdivisions (a) and (c).) The illegality presented by the pleadings (contrary to the statement by petitioners at p. 4 of their brief), was that the petitioners had not been designated by the employees. (Paragraph IV of the complaint, R. 3.) The finding of the trial court on the subject of designation is that "None of the defendants has offered or produced any evidence that any employee of plaintiffs has designated any of said unions as his collective bargaining representative." (Paragraph IV of the Findings, R. 14.) The Supreme Court of California used almost identical language. (R. 44.) The decree, therefore, was clearly intended to and did refer only to designation by the employees, not designation by the Board.

SUMMARY OF ARGUMENT

The argument of petitioners is based on the assumption that the conduct in which they engaged was an unfair labor practice. The court below correctly held that it was also a tort. Since the respondents' activities were clearly not ones protected by the Act, there is no possible question of conflict between the decree and the federal law.

The purpose of the National Labor Relations Act as stated by Congress in Section 1 of the Act itself is, among other things, to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing (including the right guaranteed under Section 7 of the

Act (Title 29, U. S. Code, Section 157) to refrain from such activities.) Section 1 further states that the elimination of certain practices by unions is a necessary prerequisite to the assurance of these rights.

The acts of petitioners constituted conduct of the type which must be so eliminated. To the extent that the states eliminate such conduct they further the purposes of the Act.

The intent of Congress to eliminate such conduct cannot be furthered by creating a rule which would completely immunize that conduct from any regulation in cases where the National Labor Relations Board decides that the industry involved does not have a sufficiently close relationship to interstate commerce to justify it in exercising jurisdiction. There is nothing in the Act or in its history to indicate that Congress actually had the least intention of immunizing such conduct in such cases, and for this Court to immunize it would to that extent frustrate the intent of Congress. The action of the state court in this case actually furthers the purposes of the Act. As this Court recognized in *Garner v. Teamsters Chauffeurs & Helpers Local Union* (1953), 346 U.S. 485, 98 L. ed. 228 and in other cases, the reasons for holding in the Garner case that the National Labor Relations Board has exclusive jurisdiction to prohibit conduct forbidden by the National Labor Relations Act do not apply where the National Labor Relations Board refuses to act on such a ground as that relied upon by it in this case. The act of the Board in declining jurisdiction is in effect an adjudication that there is no basis in the particular case for excluding state action.

The judgment for damages was proper for the additional reasons set forth by this Court in *United Construction Workers v. Laburnum Construction Corp.* (1954), 347 U.S. 656, 98 L. ed.

1025.

If Congress had intended to forbid the states to act in an area where the federal interest is too slight to justify the federal agencies in even considering the case, the Constitution would furnish no support to the legislation.

The refusal of the Board through its Regional Director to exercise jurisdiction in the related representation proceeding was equivalent to a ruling by the Board that it would not accept jurisdiction of any phase of the case, and in any event, the announcements of the Board that it would not accept jurisdiction in such cases were intended to be and were notice to all that they need not apply to the Board for relief.

ARGUMENT

THE STATE COURT DID NOT PURPORT TO ENFORCE THE NATIONAL LABOR RELATIONS ACT, BUT RATHER COMMON LAW PRINCIPLES.

The courts below found that the conduct of the respondents violated *both* the state *and* the federal law. As to the state law, it appears from the opinion below that similar conduct was held unlawful in California in *Park & Tilford Import Corp. v. International Brotherhood of Teamsters* (1946), 27 Cal. 2d 599, 165 Pac. 2d 891, which was decided at a time when no conduct of a union was stigmatized by the National Labor Relations Act as an unfair labor practice.

The court below followed the Park & Tilford case and *James v. Marinship* (1944), 25 Cal. 2d 721, 155 Pac. 2d 329, and did not purport to base its decision on the fact that the conduct enjoined was an unfair labor practice. Respondents at all stages of

the proceedings questioned that the conduct was an unfair labor practice. Petitioners contended that it was. The court below, though stating that it was one, cited that fact, at most, as bearing upon the question of common-law privilege, and rested its decision on common-law principles.

The common-law rule enforced in this case is simply the general rule stated in the Restatement of Torts, Section 766, that with certain exceptions:

> ". . . One who, without a privilege to do so, induces or otherwise purposely causes a third person not to
>
> (a) perform a contract with another, or
>
> (b) enter into or continue a business relation with another
>
> is liable to the other for the harm caused thereby."

The specific application of the principle to situations such as the present is found in Section 794 of the Restatement, which reads as follows:

> "An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."

The reason why the union conduct is unlawful is that it would compel the employer to perform an act that was forbidden by the National Labor Relations Act even before its amendment by the Taft-Hartley Act. The injuncton below does not depend upon the fact that the union conduct is itself forbidden by the National Labor Relations Act, and the Park & Tilford case cited supra

shows that such conduct was expressly held to be wrongful under California law before the Taft-Hartley Act was passed and at a time when the National Labor Relations Act placed no restrictions upon unions. The decision below in its essence does not depend on the fact that the conduct enjoined was an unfair labor practice; it was based rather upon the fact that an *employer* subject to the Act is guilty of an unfair labor practice if he signs such a contract under such circumstances. This is what was held in the Park & Tilford case.

The conduct which the petitioners were found guilty of engaging in was seeking to compel respondents, by means of picketing and economic pressure, to recognize petitioners as the representatives of respondents' employees and sign a union shop contract with petitioners, all of which would have been clearly in violation of the National Labor Relations Act, since petitioners were not the representatives of respondents' employees. It cannot be doubted that the mere execution of such a contract by an employer subject to the Act would be an unfair labor practice, under Sections 8(a)(1) and 8(a)(3) of the Act. See *Ken-Rad Tube and Lamp Corp.* (1945), 62 N.L.R.B. 21; *Park & Tilford Import Corp.* (1945), 47 N.L.R.B. 411, 414; *Midwest Piping and Supply Co., Inc.* (1945), 63 N.L.R.B. 1060.

Though the recognition of a union not designated by the employees and the execution of such a contract with it would clearly be an unfair labor practice, it is perhaps not so clear that picketing to compel the employer to do so is also an unfair labor practice. Section 8(b) (2) may cover the situation in part, but there is little authority on the point. The respondents at all stages of the proceedings below questioned that such conduct is a violation of that provision, and the petitioners have never cited a case

on the point. The Supreme Court of California said that such conduct was a violation of that section and we do not at this time quarrel with that view.

We nevertheless call the matter to the attention of this Court because the entire argument of petitioners rests upon it. Since it is not questioned that the execution of such a contract would be unlawful under the National Labor Relations Act, it is clear that the attempt to compel its execution cannot be protected activity under that Act. Hence, if such an attempt is not directly prohibited by the Act, it is conduct which, being neither protected nor regulated by the Act, is under familiar principles subject to regulation by the state. *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 86 L. ed. 1154; *International Union v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 93 L. ed. 651; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board* (1949), 336 U.S. 301, 93 L. ed. 691.

Thus if, as respondents felt when the case was pending in the courts below, such conduct is not an unfair labor practice by the union, the case is at an end. This Court must find that it is an unfair labor practice in order to reach the questions raised by petitioners.

Although it is not true that the state court held the union's conduct to be lawful under state law and that it enjoined that conduct only because it violated the National Labor Relations Act, we may in the greater part of this brief discuss the law on the assumption that it were true, because we believe that if it were true it would be all the more necessary to affirm the judgment. Obviously, even if the state court had acted on the ground that

the picketing, though lawful under the state law, was an unfair labor practice under the Act, it would have been saying that as applied to such cases it would model its law upon the federal law. This raises no federal question but to the contrary eliminates any conceivable conflict with the policy of Congress. It has never been held that a state may not, if it chooses, model its law as applied to a particular situation upon the federal law, nor has it been held that it may not do this by judicial decision rather than by statute.

Here again, it must be emphasized that not only the questions presented, but the entire argument of petitioners is an attack on the jurisdiction of the state to act. The jurisdiction of a state or a state court, under the Constitution of the United States, is not ordinarily vitiated by the reason it gives for its action if the action itself is under the circumstances within its power.

The asserted fact that the conduct enjoined was in itself an unfair labor practice serves to emphasize the necessity of holding that the state court had power to act. Congress cannot have intended to create a situation where no law can be enforced because two laws are being violated.

II

THE PURPOSE OF THE NATIONAL LABOR RELATIONS ACT IS TO PREVENT CONDUCT DEFINED TO BE AN UNFAIR LABOR PRACTICE, NOT TO IMMUNIZE IT FROM ALL REGULATION.

The contention of the petitioners is that the conduct which they engaged in was conduct forbidden by the National Labor

Relations Act and that therefore the states had no power to prevent them from engaging in it.

Insofar as the activities of the unions are concerned the purpose of Congress in adopting the National Labor Relations Act is stated in Section 1 of the Act as follows:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.
>
> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (National Labor Relations Act, § 1, Title 29, U.S. Code § 151.)

Congress has thus declared that certain practices by unions tend to obstruct interstate commerce and that therefore these

practices, insofar as they interfere with the exercise by workers of full freedom of association, self-organization, and designation of representatives must be eliminated.

In order to carry out this purpose Congress conferred on the National Labor Relations Board authority to prevent such practices. (National Labor Relations Act, § 10; Title 29, U.S. Code, § 160.)

It also conferred on that Board the power to limit its own jurisdiction by refusing to entertain cases involving relatively small impact on interstate commerce. (See Part IV, *infra.*)

This Court has held that, though the Act "leaves much to the states" of their power over labor relations, Congress by the passage of the Act intended to deprive the states of their power to regulate practices forbidden by the Act and regulated by the Board. *Garner v. Teamsters, Chauffeurs & Helpers Local Union* (1953), 346 U.S. 485, 98 L. ed. 228. As that decision was based upon the fear of conflict of orders and decrees of the state authorities with those of the Board, this Court took care to point out that the problem resulting from a refusal of the Board to exercise its jurisdiction was not involved. In the later case of *Building Trades Council v. Kinard Construction Co.* (1954), 346 U.S. 933, 98 L. ed. 423, the reservation of this question was even more emphatic.

There is no suggestion in any case, or anywhere in the Act, that Congress, by giving the Board power to decline to exercise its jurisdiction, intended to place above all law the very conduct expressly declared to be injurious and unlawful.

Such a holding would place an enormous number of small businesses such as that of respondents, and their employees, to say nothing of the unions representing or seeking to represent such employees, outside the pale of the law, and would deprive

them of protection which Congress has found necessary for the protection of larger and more powerful organizations and enterprises, as well as of whatever similar protections the various states have found it necessary or advisable to apply. To impute such an intent to Congress seems to us to border on scandalous disrespect to that body.

This Court recognized in the Garner case itself that if injurious conduct is "governable by the state or entirely ungovernable" it must be left to the power of the state to govern it. *Garner v. Teamsters, Chauffeurs & Helpers Local Union* (1953), 346 U. S. 485, 488, 98 L. ed. 228, 238. This principle is clearly applicable to the present case.

Moreover, it is settled that conduct neither protected nor forbidden by the Act can be regulated by the states. *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 86 L. ed. 1154; *International Union v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 93 L. ed. 651; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board* (1949), 336 U.S. 301, 93 L. ed. 691. Therefore, the argument of petitioners reduces to the contention that *by the very act of forbidding this conduct,* Congress immunized it from all regulations.

We submit that this is a strange way of carrying out the intent of Congress. Congress considered the conduct injurious and wished to prevent it. Permitting the states to act will not guarantee that that intent will always be carried out; but forbidding them to act will guarantee that it will *not* be carried out.

III

THE INTENT OF CONGRESS CANNOT BE CARRIED OUT BY IMMUNIZING FROM REGULATION THE CONDUCT CONGRESS SOUGHT TO WIPE OUT.

A. *The Act itself contains nothing indicating any intent by Congress to foreclose state action.*

The brief of petitioners is an attempt to accomplish a most extraordinary *tour de force.* Stripped of the elaborate verbal machinery contained in their brief, petitioners' position is that by the very fact of finding certain conduct to be injurious and forbidding it, Congress intended to protect that very conduct from all regulation in a wide class of cases. The intention of Congress was clearly to the contrary.

Petitioners make little attempt to point to any particular provisions of the Act to show any such intent on the part of Congress but rather rely for the most part on legalistic arguments to show that Congress must be considered to have intended restrictions which it did not see fit to write expressly into the Act. Such arguments will not suffice, for this Court has frequently recognized that exclusion of state power is not to be lightly implied. See for example *Gilvary v. Cuyahoga Valley R. Co.* (1934), 292 U.S. 57, 60, 78 L. ed. 1123, 1126, in which this Court pointed out that the intention to exclude state power "will not be implied unless, when fairly interpreted, the Federal measure is plainly inconsistent with state regulation of the same matter." Long ago in *Sinnot v. Davenport* (1859), 63 U.S. (22 How.) 227, 243, 16 L. ed. 243, 247, this Court said:

"We agree, that in the application of this principle of supremacy of an Act of Congress in a case where the State law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together . . ."

Examples of such language occur in cases interpreting the National Labor Relations Act. Thus in *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 749, 86 L. ed. 1154, 1164, this Court said:

"Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' "

Indeed, as applied to situations of the very type presented in this case, this Court has not been entirely silent.

The decision below is in full accord with the principle enunciated by this Court in *Bethlehem Steel Company v. New York State Labor Relations Board* (1947), 330 U.S. 767, 774, 91 L. ed. 1234, 1246:

"However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, [citation], or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, [citations]. The states are

in those cases permitted to use their police power in the interval."

It is true that the Court refrained from expressly applying this to action of the National Labor Relations Board in refusing to exercise jurisdiction in certain types of cases "for budgetary or other reasons." This undoubtedly was the only proper course for the Court to take, as the holding of the case was that the Board had in effect regulated the matter, and in a manner contrary to the rule the state board sought to enforce, so that the question of a refusal to act at all was not before the Court. The application of the principle to the present case is, however, plain. The Board has in this case decided that the controversy falls into a "separable or distinct" segment of the matter covered by the federal statute and that it chooses not to apply the federal regulation to that segment.

Petitioners argue (pp. 14, 15) that in the Bethlehem Steel case three Justices disagreed with the "suggestion" that this might be the appropriate result. To the contrary these Justices argued for an even wider scope to the power of the states, and in the language quoted by petitioners, in urging that the majority had drawn the line in the wrong place, contended that other cases should be treated like the present one by allowing the states to act in those other cases, not that the power should be denied in cases like the present. Moreover, these three Justices considered only a refusal induced by budgetary reasons. In the present case the National Labor Relations Board declined to act, not for budgetary reasons, or because it is on "short rations," but because it found that the purposes of the National Labor Relations Act would not be effectuated by its intervention. In effect, it found that the impact

of the situation on interstate commerce is too small to justify action by the Federal Government. Such a ruling necessarily implies that the interest of the Federal Government is likewise too slight to justify excluding action by the states, and if Congress has by implication authorized the Board to make and act on such a finding it must have authorized the implication inherent in it.

Petitioners throughout their brief refer to the powers given to the Board under Section 10(a) of the National Labor Relations Act (Title 29, U.S. Code, § 160(a)) to cede jurisdiction over certain industries to the state boards.

This authority was by its plain terms given to permit the Board to cede jurisdiction over entire industries in particular cases. As appears, for example, from the very instance which gave rise to it (See *Bethlehem Steel Company v. New York State Labor Relations Board, supra*), it applies to cases in which the Board would otherwise exercise jurisdiction. The majority in that case held that the states could not act in the field over which the Board had and would exercise jurisdiction but expressly refrained from including in its decision cases like the present. The minority succinctly and apparently correctly summed up the effect of the decision as follows:

> "Apart from the suggestion that the National Board's declination of jurisdiction 'in certain types of cases, for budgetary or other reasons' might leave room for the State in those situations, the Court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining in all industries within its borders as to which Congress has granted opportunity to invoke the

authority of the National Board." (330 U.S. at 778, 91 L. ed. at 1248).

Thus is stated the supposed rule and its exception. It was obviously the rule that Congress was in so much haste to change by adding a proviso to Section 10(a) of the Taft-Hartley Act, then under consideration. Clearly there was no emergency which required it to confirm the exception without delay.

By its terms Section 10(a) empowers the Board to cede jurisdiction over cases of such importance to the Federal system that the Board could not or would not refuse to exercise jurisdiction in the absence of such specific authority. Except in the case of the mining, manufacturing, transportation, and communications industries the power is not limited to cases predominantly local in character and even as to those industries, cases "predominantly local" in character might still have a pronounced effect on interstate commerce, clearly requiring the intervention of the National Board if it were not for the existence of a local board to which authority had been ceded and which could be counted on to handle the situation. This type of cession is permitted to extend, for example, to all wholesaling and jobbing operations, including those shipping largely or exclusively in interstate commerce, as well as to the great mail order houses and other activities constantly and directly engaged in interstate commerce in great volume. The section would obviously permit the Board to cede to a state agency its power over the vast majority of the entire business of distributing goods in interstate commerce, indeed to all such business carried on within the state, except that it could not, perhaps, cede jurisdiction over such business if carried on by manufacturing and mining concerns not predominantly local in

character, and it could not, of course, cede jurisdiction over the actual instrumentalities of commerce, such as common carriers (to the extent that they are subject to the National Labor Relations Act) and communications facilities. A statutory authority to cede jurisdiction over such activities obviously involves entirely different considerations from those applicable to cases, such as that of the small retailers involved in this case, over which the Board would in any event decline to exercise its jurisdiction because of a determination that the impact of the situation on interstate commerce was not sufficient to justify its action. If the situation is such that the Board would find its acceptance of jurisdiction necessary in the absence of a specific statutory authority to cede jurisdiction, obviously there are good reasons for requiring that the state conform to the federal law before the state authorities can be allowed to act, but where the case is of such small importance that the Board would not have taken it in any event, and in fact actually refused to take it, the necessity for such safeguards disappears. Restrictions properly applicable to the one situation cannot be supposed to have been intended by Congress to apply to the other.

The Board itself has clearly indicated its view that the proviso to Section 10(a) applies where its jurisdictional standards do not. Thus in *Punch Press Repair Corp.* (1950), 89 N.L.R.B. 614, *Adams Motors Inc.* (1948), 80 N.L.R.B. 1518, and *Kaiser-Frazer Parts Corp.* (1948), 80 N.L.R.B. 1050, the Board was asked for various reasons to decline jurisdiction in cases in which its jurisdictional policy then in effect required it to accept jurisdiction. It refused to do so on the ground that there was no cession agreement in effect under Section 10(a) which would permit it to decline jurisdiction. If these had been cases in which the Board

would as a matter of policy have declined jurisdiction, this question could not even have arisen, and these three cases show beyond question that the Board felt that its jurisdictional policy applied to an entirely different class of cases than did agreements that might be entered into under Section 10(a).

If any further evidence were needed that the proviso to Section 10(a) applies only to cases the Board would otherwise accept jurisdiction over, and is not intended to imply a limitation on the power of the state over cases over which the Board would not accept jurisdiction, it is found in the fact that the section applies only to unfair labor practice proceedings, not to representation proceedings. In cases over which the Board would decline jurisdiction anyway, there could be no reason not to permit cession agreements to cover representation matters also. Surely Congress cannot be supposed to have intended that questions of representation should remain wholly unresolved in such cases. The only possible explanation for this omission is that Congress believed the states already had power to deal with cases over which the Board would not accept jurisdiction, so that it was necessary to provide for cession agreements only to cover other classes of cases.

There is no possible way in which the decision below can controvene any actual or supposed policy or intent of Congress.

B. *The legislative history of the Act indicates that Congress did not intend any such restriction on the power of the state.*

The petitioners attempt to assert that legislative history indicates that Congress supports the position taken by them in this case. It is apparent from the statement of petitioners themselves that this asserted legislative history is, to say the least,

highly equivocal. Actually, insofar as legislative history is any guide in this case, it tends to support the state's jurisdiction.

In this connection it is important to have in mind the factual background in which Congress was acting. The fact is that state courts and boards have habitually, and as a matter of course, acted in fields in which the National Labor Relations Board had but declined to exercise jurisdiction. As the Board itself has said:

> "The fact is that this Board, since the earliest days of the Wagner Act, has operated on the premise, which has court and legislative approval, that the Board has discretion to determine the circumstances under which it will exercise its jurisdiction over labor disputes. Prior to 1950, this discretion was exercised on a case-to-case basis, but it is a matter of history that the Board for years refused to assert jurisdiction over many establishments, such as retail stores, hotels, restaurants, taxicabs, local transit companies, and even the entire construction industry." *Breeding Transfer Co.* (1954), 110 N.L.R.B. 493, 495.

During all of these years state labor boards, such as the New York board, exercised jurisdiction over such industries as a matter of course, and their right to do so was never questioned.

Indeed, the Board itself clearly contemplated and intended in formulating its new jurisdictional standards in 1954 that the states should be free to exercise jurisdiction where the Board declined it. Thus in the Breeding Transfer Company case, *supra*, at page 497, the Board stated:

> "If one of the inevitable consequences of our action is to leave a somewhat larger area for local regulation of dis-

putes, we do not share our colleagues' apparent view that this is a sinister development."

Two minority members of the Board stated that allocating more power to the states was the *purpose* of the change in the jurisdictional standards under discussion. (PP. 501, 528.) The majority denied this, but did not deny that that would be its effect. Thus all agreed that the states apparently had the power to act where the Board would not, though some may have viewed the matter as not being certain. (P. 528). Those who thought the states ought not to have the power to act in a particular case would have remedied that situation, in their own view by having the Board itself assert its jurisdiction, but did not contend that there would be a "power vacuum." In *Bethlehem Steel Co. v. New York State Labor Relations Board* (1947), 330 U.S. 767, 91 L. ed. 1234, the National Board in an amicus curiae brief clearly stated its view that the states had and ought to have power to act in such cases. Significant portions of that brief are set out in Appendix C, *infra*, p. 55.

This Court also has led Congress to believe that the power to act in such cases remained in the states.

In *Consolidated Edison Company v. National Labor Relations Board* (1938), 305 U.S. 197, 223, 83 L. ed. 126, 137, this Court not only recognized the power of the states to act, but indeed said that the Board should in some cases take that very fact into account in determining whether to accept jurisdiction.

In *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 86 L. ed. 1154, the contention was noted by the Court and not rejected that, as in the railway rate cases, state power should be superseded in any event only after

the National Labor Relations Board had actually assumed jurisdiction.

In *Bethlehem Steel Company v. New York State Labor Relations Board* (1947), *supra*, while the majority did not pass upon the effect of a refusal of the National Labor Relations Board to exercise its jurisdiction, it did indicate that where the federal power has been delegated but lies dormant and unexercised, the mere delegation does not preclude the states from acting, and the three specially concurring justices interpreted the majority opinion as recognizing that the states can act where the Board declines to. The minority opinion, however, also interpreted the majority opinion as carrying an implication that cession agreements ceding jurisdiction over cases of which the Boards ordinarily would *exercise* jurisdiction were invalid. The minority thought the distinction unsound, but they nevertheless also thought the majority had made it.

Again in the Garner case itself (*Garner v. Teamsters, Chauffeurs & Helpers Local Union* (1953), 346 U.S. 485, 98 L. ed. 228) and in the later case of *Building Trades Council v. Kinard Construction Co.* (1954), 346 U.S. 933, 98 L. ed. 423, this Court made it clear that the question of the power of the states to act where the Board would not had not been decided against the states and was at least left open.

Thus we find an established practice of state action, and rulings of this Court that were at least susceptible of the construction that it would not interfere with that practice. The failure of Congress to enact legislation changing this situation is an indication, for what it is worth, that Congress considered the practice to be satisfactory. At least it conveys no possible implication that Congress was acquiescing in a rule forbidding state action in such

cases, for there was no such rule.

The principal Senate Report upon which petitioners rely (Senate Report No. 986, 80th Congress, 2nd Session, Part I, pages 30 to 31) was concerned with the type of case actually presented in the Bethlehem Steel case and not with cases of the present type which were expressly excluded from the decision in that case. The problem presented to the Committee arose from the fact that Section 10(a) of the National Labor Relations Act, which was designed to take care of the problem raised by the Bethlehem case and to permit agreements of the type thought to have been forbidden in that case, had substantially failed of its object because of the limitations contained therein. The Committee in the language quoted on Page 19 of the Petitioners' Brief said that if the only remedy were to relax those restrictions the desirability of doing so appeared questionable. This language applies to the problems arising with respect to cession agreement of the type thought to have been forbidden by the Bethlehem Steel case and subsequently validated by Section 10(a) of the Act, not to cases of the type passed by in the Bethlehem Steel case and apparently left to the states by that case.

Moreover, the report shows that even on the subject considered by the report, no definite conclusion was reached. The very language quoted by the petitioners shows this, and in the very next paragraph of the report the Committee stated that it intended to explore the matter further before making any recommendations.

The petitioners also refer to Senate Bill 2650 of the 83rd Congress, and make some statements about it which are erroneous in nearly every detail. That bill was a general one, designed to enact a number of revisions in the Labor Management Relations

Act of 1947 in accordance with recommendations of the President of the United States. Senate Report 1211 on the bill shows that, contrary to the statement of the petitioners, the bill as reported out by the Committee did contain a provision to add Section 6(b) to the Act to carry out the recommendation of the President that in cases such as the present "it should be *made clear* by legislation that the States are free to act." (Italics added.) (Senate Report No. 1211, 83rd Congress, 2d Session, pp. 8 and 9. This appears also from the summary of the reported bill at 100 Cong. Rec. 5832.) The clarificatory nature of the amendment is emphasized by the fact that it expressly authorized the long established power of the Board to decline jurisdiction in the first place. The report also recommended adding a new subsection 14(c) to the Act which would have given the states power to act in other cases in emergencies. Senator Goldwater proposed a different Section 14(c) which would, among other things, have overruled the Garner case in its entirety. (100 Cong. Rec. 5840, 5994.) The Bill was eventually recommitted—not as petitioners say, to include a provision covering situations of the type involved in this case "should a majority of the Committee so desire"—but rather after a debate principally concerned with the fact that other amendments not recommended by the President had not been considered by the Committee. The debate commenced on 100 Cong. Rec. 5826, and continued thereafter from day to day until the entire bill was recommitted. The proposed versions of Section 14(c) were occasionally mentioned in the discussion, but 6(b) rarely, if at all. It is apparently the very drastic amendment of Senator Goldwater that petitioners refer to when they say the Bill was recommitted to consider an amendment. This vote is reported at 100 Cong. Rec., Page 6202.

It is noteworthy that although, of course, the Congress has been reluctant to extend the power of the federal courts to issue injunctions, which was severely limited by the passage of the Norris-LaGuardia Act (Title 29, U.S. Code, Sections 101 et seq), the petitioners have been unable to cite any single instance of a statement on the floor of Congress or in a Committee Report, of an intention or desire to limit the power of *state* courts over labor controversies.

While, therefore, the legislative history may not be such as, standing alone, to indicate clearly the intent of Congress one way or the other, it is clear in the context and in the light of the history and purposes of the National Labor Relations Act and in particular the Labor Management Relations Act of 1947, that Congress could not have intended to preclude the states from acting in cases in which the National Labor Relations Board declined to, and that to the contrary Congress at all times felt it to be desirable that the states should have that power, even though there may sometimes have been uncertainty in the minds of various members of Congress as to which way this Court would rule on the subject in the absence of specific legislation.

C. *Allowing the states to act will further, not hinder the purposes of the Act.*

Petitioners cite four dangers that they say will result from permitting the state court to act. Three of these four dangers are ones which might indeed result in another situation—namely where the National Labor Relations Board has not and there is reason to believe will not refuse to take jurisdiction. None of these three has any application where the Board has made it clear

that it will refuse to exercise its jurisdiction. Thus petitioners say that to permit the states to act would (1) conflict with the pattern of regulations imposed by the Act, (2) conflict with the Act's policy of protecting concerted activities, and (3) destroy the "balance" of the Act. These untoward consequences are to a certain extent the inevitable result of the refusal of the Board to exercise jurisdiction; but granted that refusal they would be increased by a rule prohibiting state action and alleviated to the extent that the states are permitted to and do exercise their own jurisdiction.

The fourth untoward consequence urged by petitioners is that to permit the states to act would cause "intolerable confusion." The obvious fact is that whatever confusion would be caused by permitting the states to act would be exceeded many times by denying them the power to do so.

1. *State action will assist in carrying out the federal pattern of regulation.*

Clearly, since the Board will not take jurisdiction, the state action does not involve any actual or potential conflict with orders of the Board. If at a later time the Board should change its rule or change its mind and take jurisdiction, the state court's order would simply be superseded, just as a prior order of the Board itself would be, and no conflict would develop.

Petitioners therefore assert that even though the Board declines to act there can be a conflict with the policy of the Act because it may chance that the decision of the state court would be different from that which the Board would have rendered had it accepted jurisdiction. This possibility no doubt exists, but it

can be minimized, if this Court so decides, by a holding that the state court or board must conform its decision to the federal rules of substantive law. It is, moreover, only a possibility and one of a type this Court has said should not be anticipated. *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 746, 86 L. ed. 1154, 1163. If on the other hand the state courts and boards are not permitted to act, then there is a *certainty* that the policies of the Act will not be accomplished and will be completely frustrated and defeated in all such cases.

The petitioners cite as an example of the potential conflicts between the state and federal policy the fact that the trial court in the present case determined the question of representation by evidence, rather than by an election. There are three answers to this:

1. It is better to determine such questions by evidence than not to determine them at all;

2. The petitioners did not ask the Court to hold an election; and

3. There was no genuine issue on the question of representation.

In the present case the finding that the petitioners did not represent the employees was clearly correct. The unions presented no evidence that they had been designated by even one of the employees. (Paragraph IV of the Findings, R. 14.) The entire record shows that the question of whether the employees actually had designated the unions as their representatives was not even raised at the trial. The only issue even suggested by the petitioners on the question of representation involved an insinuation that the respondents influenced their employees against the unions. They did not plead that there was any *improper* influence and

since they failed to prove any coercion, the trial court found that there was none. (R. 314.) However, under the National Labor Relations Act this whole subject would be immaterial. A union cannot be recognized as the representative of the employees, and a union shop contract cannot be signed with it, unless the union *has* been designated by the employees; and the reasons for the failure of the employees to designate the union are quite immaterial if they have not done so. Influence brought upon the men by the employer might or might not be improper, depending upon the circumstances, but the impropriety, if any, of the employer's conduct does not under the federal Act fill the lack of a proper designation.

Thus in the present case, no court or board could have reached a different result on the question of designation.

The petitioners also suggest that there was no agency to determine what would be an appropriate unit for purposes of collective bargaining. In the present case the unit was the one selected by the petitioners themselves, and there was no issue at the trial as to the appropriate unit.

The present case is a good example to show that the type of situation in which the Board declines jurisdiction will ordinarily not involve the complexities which might result in a decision other than that which the Board would have made had it accepted jurisdiction. However, even if this were not so, it is surely better to have an occasional divergence from what the Board would have done than to have the certainty of a divergence in every such case by making a rule that nothing can be done.

2. *State action is necessary to carry out the Act's policy of protecting employee activities.*

Petitioners assert that the rights guaranteed by Section 7 of the National Labor Relations Act are protected not only against employer action but against state action, citing *Hill v. Florida* (1945), 325 U.S. 538, 89 L. ed. 1782. If this is so, it is easy to vindicate these rights as against the state by striking down any state action which interferes with them. This, in fact, was what was done in the Hill case itself. Moreover, as this Court said in *Allen-Bradley Local v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 746, 86 L. ed. 1154, 1163:

> "Nor will we assume in advance that a state will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress."

It is not necessary, in the name of protecting employees against the state, which the Act does not expressly provide for, to leave them utterly defenseless against the very conduct of employers as well as of unions against which the Act is specifically directed.

A paramount purpose of the Act is to protect the employees against coercive actions by employers and by unions. That purpose cannot be carried out if the states are denied the power to act when the National Labor Relations Board declines to assume jurisdiction.

Indeed, the argument of petitioners on the subject of possible conflict with the policy of the Act regarding protected activities for the most part amounts to no more than an argument that this Court has held that states may not interefere with such activities. It completely overlooks the fact that the activity involved in the case was not a protected activity and that no pro-

tected activity was in fact enjoined.

Petitioners rely heavily on *Garner v. Teamsters, Chauffeurs & Helpers Local Union* (1953), 346 U.S. 485, 98 L. ed. 228, which, as they themselves point out, was intended to avoid the divergence of result that might be reached as between different tribunals in the same field if state action was not precluded. Neither the reasoning nor the holding applied where such divergence is not possible because the federal agency declines jurisdiction, and neither the reasoning nor the holding would justify this Court in declaring free that which Congress has declared to be forbidden. This is in fact shown by the very language quoted by petitioners from the opinion in that case. Thus as they point out, this Court in the Garner case remarked:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." (346 U.S. at 500, 98 L. ed. at 244.)

Thus, the Court in the Garner case held that the states could not declare such conduct to be free. Certainly the obstruction to the federal policy referred to by this Court in the Garner case would be no less if this Court declared the prohibited conduct to be free than it would be if the State were permitted to do so.

No rule can be justified on the premise that state action, forbidden in any case only by implication, could obstruct interstate commerce or interfere with the purposes of the Act while conduct of unions or of employers expressly found to be injurious, and for that reason expressly forbidden, does not so obstruct or interfere

with commerce or interfere with the purposes of the Act. And yet it would be necessary to hold not only that the state action would result in a great interference but that Congress so found in order to justify the inference that states are forbidden to act.

The National Labor Relations Act does not *require* the state to act when the Board declines jurisdiction; but when the states choose nevertheless to act in accordance with the National Labor Relations Act they are to that extent carrying out, not obstructing, the purposes of the federal law; and the petitioners are asking this Court to obstruct those purposes by preventing such action.

3. *State action in cases where the Board declines to accept jurisdiction will not destroy the "balance" of the Act.*

The argument of petitioners as to what they call the "balance" of the Act amounts to no more than that the states, if allowed to act at all, may enforce some rights given by the Act, but not others, or to put it conversely they may prevent some wrongful and injurious conduct but not all wrongful and injurious conduct. It is perhaps not novel for one wrongdoer to complain that another is not or may not be punished or prevented from his wrong-doing, but it is somewhat novel to expect a court to be swayed by such a complaint in its decision as to the law. Petitioners urge in support of their complaint that the Act constitutes a deliberate weighing of labor and management rights and duties which a state might upset. This contention is based upon a false premise. The Act insofar as relevant to this case is designed, according to its own statement quoted above, p. 15, to protect certain rights of employees from infringement by *either* employer or union. To the extent that the Board refuses to enforce these

rights and the state fails to supply the lack, the policy is not carried out, but to the extent that the state enforces some rights the policy of the act is promoted, even if it fails to enforce others.

4. *Confusion will be avoided by permitting the state to act.*

Whatever may be said of the uncertainty involved in the criteria of the Board for accepting and declining jurisdiction, it is eliminated where the Board has actually acted to decline jurisdiction. Moreover, this asserted uncertainty is as nothing to the uncertainty involved in letting the jurisdiction of state courts and Boards depend upon the question whether the business involved affects interstate commerce sufficiently to bring the case within the constitutional power of Congress. Yet that is what would be involved in a holding depriving the state court of jurisdiction in this case. This Court has held that the powers of the Board conferred by Congress extend as far as the power of Congress given by the Commerce Clause extends. *National Labor Relations Board v. Fainblatt* (1939), 306 U.S. 601, 83 L. ed. 1014; *Polish National Alliance v. National Labor Relations Board* (1944), 322 U.S. 643, 647, 88 L. ed. 1509, 1514.

The constitutional question of the extent of the power of Congress under the Commerce Clause to regulate local and intrastate activities is indeed difficult, and the line between what may and what may not be regulated by Congress is an extraordinarily shadowy one. It would be productive of enough problems to hold that substantive questions such as the rights granted by the National Labor Relations Board must be determined in each case by reference to this line. To hold in addition that the jurisdiction of state courts and boards depends upon it would be many times

worse. If substantive questions depend upon it, litigants may wonder whether the judgment rendered in a particular case is right or wrong. If jurisdiction depends upon it they must wonder also whether the judgment is valid. And no court below this one could give the answer.

IV

THE DECLINING OF JURISDICTION BY THE BOARD IS IN EFFECT A HOLDING THAT THE CASE SHOULD BE LEFT TO STATE ACTION.

The ground upon which the National Labor Relations Board declined jurisdiction was simply that the case was not important enough in relation to interstate commerce for it to act. The ground for declining jurisdiction amounts to a holding that the case should be left to the states. Indeed, Congress gave the Board no power to decide that the employees or employers should be deprived of rights guaranteed to them by law.

The ground of the refusal to exercise jurisdiction was that the purpose of the Act would not be effectuated by the Board's intervention because the impact of the situation on interstate commerce was too small for the conduct involved to cause a substantial obstruction to interstate commerce.

It has never been doubted that the Board has the right and power to decline jurisdiction on this ground. This Court has, in fact, stated that it acted quite properly in doing so. *National Labor Relations Board v. Denver Building and Construction Trades Council* (1951), 341 U.S. 675, 684, 95 L. ed. 1284, 1293. In *Pol-*

ish National Alliance v. National Labor Relations Board (1944), 322 U.S. 643, 648, 88 L. ed. 1509, 1515, this Court in connection th the power of the Board to determine its own jurisdiction, said:

> "Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress."

Since the Board is a creature of Congress its powers are derived from Congress, and the ground upon which its ruling is based must be held to be authorized by Congress. Thus the agency vested by Congress with the power to make a decision that the case is too small to justify federal intervention has done so. This necessarily involves the conclusion by the Board acting under the authority of Congress that state action was not inconsistent with the purposes of the federal statute.

V

THE CONTENTION OF THE PETITIONERS RAISES SERIOUS CONSTITUTIONAL QUESTIONS

The National Labor Relations Act purports not only to extend to industries which are engaged in interstate commerce but also to industries which merely affect interstate commerce. In fact, the finding of the trial court in this case was simply that the business of the respondents affected interstate commerce, not

that they were actually engaged in such commerce. The power of Congress over businesses affecting interstate commerce, unlike the power to regulate interstate commerce itself, which is conferred by Section 8 of Article I of the Constitution of the United States, is an implied power. It results from the necessities of the case, and not for its own sake. *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), 301 U.S. 1, 38, 81 L. ed. 893, 912. And as this Court said with reference to the application of the National Labor Relations Act to intrastate activities, "The justification for the exercise of Federal power should clearly appear." *Consolidated Edison Co. v. National Labor Relations Board* (1938), 305 U.S. 197, 223, 83 L. ed. 126, 137. See also *Florida v. United States* (1931), 282 U.S. 194, 75 L. ed. 291.

The Congress in passing the National Labor Relations Act has asserted that it is necessary to regulate and prohibit certain conduct in industries affecting commerce in order to protect interstate commerce. This Court has in the Jones & Laughlin case held that this declaration by Congress is justified.

It does not at all follow that Congress would have the power to say that activities which merely *affected* commerce should go entirely unregulated simply because the National Labor Relations Board found that the impact on commerce was not sufficient to justify its assuming jurisdiction. Such a statute, in the light of such a finding by the Supreme Court, would clearly exceed the powers of Congress. If Congress had actually intended this result and expressly provided for it, we submit that the statute so providing would be unconstitutional because not only is it clear that such a prohibition is not necessary to protect interstate commerce, but the prohibition of state action would by hypothesis apply to an area in which the Board acting as the agency of

Congress had said there was no need for any regulation to protect interstate commerce.

Under the circumstances we submit that the regulation would violate not only the Tenth Amendment to the Constitution of the United States but also the due process clause of the Fifth Amendment. Such unreasonable legislation would not constitute due process of law.

VI

THE JUDGMENT FOR DAMAGES IS CLEARLY JUSTIFIED UNDER THE PRIOR DECISIONS OF THIS COURT.

This question, be it noted, is not one covered by the Statement of Questions Presented, either in the Petition for Certiorari, or in Petitioners' Opening Brief.

This Court in the *United Construction Workers v. Laburnum Construction Corporation* (1954), 347 U.S. 656, 98 L. ed. 1025, held that the National Labor Relations Act does not prohibit the states from enforcing a common-law action for damages for conduct prohibited by the Act. For the reasons already pointed out this case is, insofar as the damage question is concerned, precisely such an action. See the discussion in Part IV, supra.

Petitioners' reliance upon Section 303 of the Labor Management Relations Act, which creates a cause of action and grants to the state courts jurisdiction over it, is misplaced. Nothing in that Section implies any intent to deprive the states of jurisdiction which they otherwise would have had.

VII

THE BOARD DID DECLINE TO EXERCISE JURISDICTION.

The Board in 1950 officially announced its intention and policy of declining to exercise jurisdiction in cases such as this. Such an announcement cannot be supposed to have been intended as an idle act. It was, in effect, notice to unions, employers, and state agencies to enable them to shape their conduct. At the very least it shows that appeal to the Board in such cases would be futile. The Board in its amicus curiae brief in the Bethlehem Steel case expressly took this position. See appendix C.

The Board acting through its Regional Director dismissed a representation proceeding in this very case. Such action was under an authority duly delegated to the Regional Director. Title 29, United States Code of Federal Regulations, Sections 6 and 101.17.

The general policy of the Board with respect to jurisdiction makes no distinction between an application to determine representation and one complaining of an unfair labor practice. In *C. A. Braukman, et al., dba Screw Machine Products Co.* (1951), 94 N.L.R.B. 1609, the Board said:

> "True, the Board has not heretofore considered the instant complaint case. However, because the Board does not, with respect to the question of jurisdiction, differentiate between representation and complaint cases, we believe that dismissal of the . . . . . representation case on jurisdictional grounds . . . . . was in effect, notice to all parties concerned that any complaint case based on alleged unfair labor practices . . . . . would similarly be dismissed." (P. 1611.)

(See also *National Labor Relations Board v. Guy F. Atkinson Co.* (1952), 195 Fed. 2d 141.)

In answer to this petitioners point out that in the first instance it is the General Counsel of the Board who decides an appeal on the question of jurisdiction in an unfair labor practice case whereas the Board does so in a representation case. They overlook, however, that even in an unfair labor practice case, if the General Counsel accepts jurisdiction, the Board can still decline it when the case gets to the Board. We submit that the statement quoted above from the Braukman case was intended by the Board to obviate any doubt on this very point.

Petitioners also suggest that respondents should have appealed to the National Labor Relations Board from the decision of the Regional Director declining jurisdiction. In the first place, as the Supreme Court of California pointed out, such an appeal would have been futile in the light of the expressed policy of the Board. The Board had made general pronouncements (press releases dated October 6, 1950 and July 14, 1954; see Appendix B) that it would exercise jurisdiction over a retail enterprise only when that enterprise had a direct inflow of material valued at $500,000.00 a year or an indirect flow valued at $1,000,000.00 a year. These standards were discussed and explained in *Breeding Transfer Company* (1954), 110 N.L.R.B. 493. The 1954 standards as to retail stores were first applied in *J. R. Knott, et al., dba Hogue & Knott Supermarkets* (1954), 110 N.L.R.B. 543. The 1950 standards as applied to retail stores were first applied in *Dorn's House of Miracles, Inc.* (1950), 91 N.L.R.B. 632; and *Federal Dairy Co., Inc.* (1950), 91 N.L.R.B. 638. In view of the evidence and the finding that the inflow of the respondents in this case did not exceed $250,000.00 a year an appeal would obviously

have been futile.

The Board itself has treated a withdrawal of a petition at the suggestion of its local agents as constituting a bar to subsequent unfair labor practice charges under the rule of the Braukman case, even though there never had been any formal dismissal of the proceedings even by the Regional Director. *John Almeida, Jr., dba Almeida Bus Service* (1952), 99 N.L.R.B. 498. In the Almeida case the original withdrawal was followed by proceedings before the Massachusetts Labor Relations Commission. The National Board noted this fact in considerable detail and with apparent acquiescence.

Petitioners suggest in this connection that the doctrine of exhaustion of administrative remedies has some application to the case. The doctrine of administrative remedies, however, has never been held to be a constitutional doctrine capable of allocating power between the states and the Federal Government. It is a rule applicable where an attempt is made to institute a legal attack upon an administrative decision designed to prevent unnecessary judicial interference with the proceedings of administrative agencies at their early or intermediate stages when there is still a chance that the administrative agency will render such interference unnecessary by itself correcting the asserted error. The case cited by petitioners on this point, *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41, 82 L. ed. 638, involves a typical attempt to induce the court to indulge in such an interference with the administrative processes. The rule is that in such a case it is necessary first to exhaust whatever administrative remedies are available to get that administrative decision changed. In the present case no attempt was made to challenge the validity of the administrative decision nor its correctness. It was unques-

tionably correct, and an attempt to challenge it would have been futile, as the Supreme Court of California observed. (R. 49.) Petitioners cite no authority for the proposition that the doctrine of exhaustion of administrative remedies applies to such a case.

Moreover, this is not merely a case where the choice is between an administrative tribunal and a court. The position of the respondents is not merely a lack of jurisdiction in the particular court as distinguished from some administrative tribunal but rather a lack of jurisdiction in the State of California itself to apply any remedy to the situation. The arguments of petitioners, if they were sound, would for the most part apply even though the State of California had set up an administrative tribunal and the proceedings now under attack had been conducted by that tribunal.

The question of the power of a state to act depends upon constitutional questions and upon the interpretation of acts of Congress. We have been cited to no case holding that it can depend upon such technicalities as the exhaustion of administrative remedies. We submit that such a doctrine ought not now to be created.

It seems almost superfluous to add that the remedy by appeal to the Board was hardly an adequate one, in view of the announced policy of the Board and the obvious correctness of the Regional Director's ruling. This Court has pointed out that where the administrative remedy is inadequate, resort to the courts is proper. *Steele v. Louisville & Nashville Railroad Co.* (1944), 323 U.S. 192, 205, 206, 89 L. ed. 173, 185. In the present case such an appeal would obviously have been an idle act, and requiring it in such cases would serve only to delay justice, sometimes to the extent of denying it.

CONCLUSION

For the reasons above set forth the decisions of the courts below were correct, the case was one within the jurisdiction of the state, and the decision should therefore be affirmed.

Respectfully submitted,
J. Sterling Hutcheson
Counsel for Respondents

James W. Archer
Ward W. Waddell, Jr.
Of Counsel

APPENDIX A

CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 8

The Congress shall have Power . . .

. . . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

AMENDMENTS TO THE CONSTITUTION

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES

Section 1 of the National Labor Relations Act (Title 29, U.S. Code, Section 151) is set out in part in the body of the brief, p. 15.

National Labor Relations Act, Section 7 (Title 29, U. S. Code, Section 157)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

National Labor Relations Act, Section 8 (Title 29, U. S. Code, Section 158)

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) . . . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . . .

National Labor Relations Act, Section 9 (Title 29, U. S. Code, Section 159)

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of

collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

. . . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

. . . . .

National Labor Relations Act, Section 10 (Title 29, U. S. Code, Section 160)

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor dis-

putes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

REGULATIONS

Title 29, United States Code of Federal Regulations, Section 6

Under the general supervision and direction of the General Counsel the Regional Directors have the following authority:

. . . . .

(c) To decline to issue a complaint or a Notice of Hearing, subject to the right of the aggrieved party, in the case of a complaint, to appeal to the General Counsel, and in the case of a Notice of Hearing in a representation case, to appeal to the Board. . . . .

Title 29, United States Code of Federal Regulations, Section 101.17

(a) Upon receipt of the petition in the Regional Office, it is docketed and assigned to a member of the staff, usually a Field Examiner, for investigation. He conducts an investigation to ascertain . . . (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, . . .

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate,

or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification, the showing of representation among the employees is insufficient to warrant an election under the 30 percent principle stated in paragraph (a) of this Section.

(c) For the same or similar reasons the Regional Director may request the petitioner to withdraw its petition. If, despite the Regional Director's recommendation, the petitioner refuses to withdraw the petition, the Regional Director then dismisses the petition stating the grounds for his dismissal and informing the petitioner of his right of appeal to the Board in Washington, D. C. The petitioner may within 10 days appeal from the Regional Director's dismissal by filing such request with the Board in Washington. After a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the Regional Director to take further action.

APPENDIX B

N.L.R.B. Jurisdictional Standards—1950
National Labor Relations Board

October 6, 1950 No. 342

N.L.R.B. Clarifies and defines Areas in Which it Will and Will Not Exercise Jurisdiction

The National Labor Relations Board today announced the establishment of standards which will govern its exercise of

jurisdiction under the Taft-Hartley Act.

The various "yardsticks" which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. . . . . .

The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution the Board will exercise jurisdiction over:

. . . . .

6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; . . . .

. . . . .

N.L.R.B. Jurisdictional Standards—1954.
National Labor Relations Board

July 15, 1954 R-449

N.L.R.B. Announces New Standards for Exercise of Jurisdiction.

The National Labor Relations Board today established new standards for determining whether the Board will take jurisdiction over cases involving retail stores, utility companies, transit systems, radio and television stations, newspapers, certain types of interstate companies, industrial service companies, and companies engaged in national defense work.

. . . . .

The standards announced today are in addition to the new standards announced by the Board June 30, 1954. Those announced today also modify earlier standards adopted by the Board in October 1950. The changes announced today follow:

A. For retail stores, the Board established two standards—one to govern in cases involving stores operating entirely within one state and the other to govern in cases involving chain stores operating in more than one state. The new standards are:

(1) A single independent retail store or a chain of stores operating entirely within one state will not come under the Board's jurisdiction unless the store involved in the case has

(a) purchases amounting to at least $1,000,000 a year coming to it directly from outside the state, or

(b) purchases of $2,000,000 a year coming to it indirectly from outside the state, or

(c) if the store ships $100,000 worth of merchandise into other states.

(2) A store which is part of a chain operating in more than one state will come under Board jurisdiction if

(a) the store meets either of the standards listed in (1) for intra-state stores, or

(b) the gross sales of the chain amount to $10,000,000 or more per year.

(The former standards for stores were $500,000 a year direct purchases or $1,000,000 indirect purchases, or $25,000 a year sales made outside the state.)

. . . .

APPENDIX C

Excerpts from Brief for the United States as Amicus Curiae in *Bethlehem Steel Company v. New York State Labor Relations Board* (1947), 330 U.S. 767, 91 L. ed. 1234.

(Page 66)

We have stated what we believe to be the unsettling effect of a concurrent state and Federal [67] jurisdiction over labor relations. That discussion presupposed that the National Board was actively exercising its authority, as it does in the major interstate industries and in most fields subject to its jurisdiction. . . . .

(Page 69)

In this field in which the National Board can but does not take jurisdiction, it is obviously more consonant with the policy of the National statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10(a) . . . . . The friction, confusion and uncertainty arising from the application of dual controls, to which we have referred, are non-existent where the National Board will not exercise its jurisdiction. The National Board accordingly believes that the mere existence of the National statute should not deprive the states of power to apply a similar policy to employers over whom the National Board does not take jurisdiction.

Since the states may take jurisdiction, however, only if the National Board declines to apply the National Act to the enterprise involved, a showing of such refusal to take jurisdiction by

the National Board is a prerequisite to the assertion of jurisdiction by the states. This does not necessarily mean [70] that a petition or charge must be filed with the National Board in each individual case. The National Board may announce a general policy of declining jurisdiction in an entire class of cases. . . . : In such cases the National Board's announcement of general policy is itself adequate to justify the initiation of proceedings before the State Board . . . . ."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

On Writ of Certiorari to the Supreme Court of California

RESPONDENTS' PETITION FOR REHEARING

TO THE UNITED STATES SUPREME COURT AND THE JUSTICES THEREOF:

The respondents in the above entitled cause present this, their petition for rehearing of the above entitled cause, and, in support thereof, respectfully show:

I

THE DECISION DEPRIVES RESPONDENTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

The decision of this Honorable Court determines that the parties are subject to the National Labor Relations Act with respect to the matters in dispute, but deprives them of any effective remedy for the enforcement of the rights granted by the said Act, and deprives them of any effective forum for the adjudication of their rights and obligations under the said Act. Other persons subject to the same Act are furnished a remedy. This discrimination against respondents is based essentially on the size and wealth of the enterprise and not on any reasonable classification relating to the merits of the case. Still other persons are held not to be subject to the Act at all and therefore entitled to any remedy given them by state law.

This obviously unjust and discriminatory treatment constitutes a deprivation of the property of respondents without due process of law as set forth in more detail in the petition for rehearing filed by the respondent in *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, Case No. 41.

II

THE DECISION WORKS AN UNCONSTITUTIONAL INTERFERENCE WITH THE POLICE POWER OF THE STATES AND THEREBY DISTURBS THE FABRIC OF THE FEDERAL SYSTEM

The holding of this Court is that the states are deprived of power to act in a large field clearly within the scope of their police power. The sole reason for this is that this Court has attributed

to Congress an unexpressed intention to exclude them.

This Court has not considered whether Congress would have had the power to do what this Honorable Court has held that it intended to do. The National Labor Relations Act is an exercise of the power granted to Congress by Article I, Section 8, of the United States Constitution to regulate commerce among the states. The Act as interpreted by this Court is not, however, a regulation *of* interstate commerce. It is a regulation of all business *affecting* interstate commerce. This Court long ago determined that a federal regulation depriving the states of their power over intra-state activities is permissible under the interstate commerce clause to the extent, but *only* to the extent, that it is reasonably necessary to protect interstate commerce and enable the federal regulation of interstate commerce to be applied effectively. *Houston, East & West Texas Railroad Company* v. *United States (The Shreveport Rate Case)* (1914) 234 U. S. 342, 58 L. ed. 1341. This Court has held, moreover, that the National Labor Relations Act may, under the principle established in the Shreveport case, be constitutionally applied to businesses and activities which merely affect commerce. See the cases cited in Respondents' Brief in this case at page 40, and particularly *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, (1937) 301 U. S. 1, 38, 81 L. ed. 893, 912. That decision was based upon an express holding by Congress, contained in the Preamble to the Act itself, that there existed practices harmful to interstate commerce which the Act was designed to prevent. Neither that case nor any other furnishes any support to the present decision, which deprives the states of their power to act without making any attempt to prevent these harmful activities, and to the contrary renders them immune from any regulation which would effectively prevent them.

None of the arguments raised by petitioners in this case and in *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, Case No.

41, or by appellant in *Guss* v. *Utah Labor Relations Board,* Case No. 280, or by any of the *amici curiae* supporting them, touch this problem in any way. None of them suggest any reason why depriving the states of their power to act would under the circumstances have any tendency to protect interstate commerce or to make more effective the congressional regulation of interstate commerce. None of them suggest any reason why Congress could have thought it would have such a tendency. None of the reasons given by this Court for its decision touch this question. They treat the case as if Congress had the plenary power to regulate all the industries involved for all purposes, so that the only question is what is the best regulation of such businesses, or the regulation that would be and presumedly was preferred by Congress, considered only for its own sake and not in relation to any need to protect interstate commerce.

Nothing in the Preamble to the Act or in the Act itself suggests any need for excluding state power over such industries, or any industries, as a means of protecting interstate commerce where the federal regulation is not effectively applied.

Therefore, none of the arguments made by petitioners in this or any other case, and no reason given in the opinion in this case and no finding or purpose that can be found in or inferred from the Act itself, even suggests any reason why the power to carry out the intention attributed by this Court to Congress would fall within the limited powers conferred by the Constitution.

We submit therefore that, as was pointed out at p. 39 of our brief, no constitutional basis has been shown for the interference with state power created by this Honorable Court's interpretation of the National Labor Relations Act, and that interference, therefore, violates the Tenth Amendment to the Constitution of the United States.

CONCLUSION

Upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Supreme Court of the State of California be upon further consideration affirmed.

DATED: April 16, 1957.

Respectfully submitted

JAMES W. ARCHER
J. STERLING HUTCHESON

Counsel for Respondents

WARD W. WADDELL, JR.
Of Counsel

Certificate of Counsel

I, counsel for the above named respondents, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JAMES W. ARCHER
Counsel for Respondents

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,
Petitioners,

vs.

J. S. GARMON, J. M. GARMON AND W. A. GARMON,
Respondents.

On Writ of Certiorari to the Supreme Court of California

MOTION TO TAX COSTS AND DISALLOW THE COST OF PRINTING UNNECESSARY PARTS OF RECORD

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OCTOBER TERM, 1956

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON AND W. A. GARMON,

Respondents.

MOTION TO TAX COSTS AND DISALLOW THE COST OF PRINTING UNNECESSARY PARTS OF RECORD

J. S. GARMON, J. M. GARMON and W. A. GARMON, respondents in the above entitled cause, move this Court for an order taxing costs in the above entitled case and directing that the cost of including in the printed record the Reporter's Transcript of the oral proceedings in the trial court (constituting 253 pages of the printed record) be disallowed as costs in this Court pursuant to Paragraph 7 of Rule 36 of this Court on the ground that the said Reporter's Transcript was an unnecessary part of

the record to be printed and that the petitioners have nevertheless caused the same to be printed. The said motion is based upon the following facts:

1. Petitioners through their counsel John B. Stevenson by Petitioners' Designation of Portions of the Record to be Printed, dated May 25, 1956, designated all the record in this case to be printed except for certain items which do not include the Reporter's Transcript of the proceedings in the trial court;

2. The questions presented to this Court as specified in both the petition for certiorari and the brief of petitioners relate solely to the jurisdiction of the state court to proceed and are specifically stated to be questions posed by the conclusions of the Supreme Court of California, all of which questions turn solely upon the opinion of the Supreme Court of California, and possibly upon the pleadings, Findings of Fact and Conclusions of Law, and Judgment of the trial court, and not upon facts appearing only in the oral proceedings in the trial court.

3. The statements of facts in the opinion of the Supreme Court of California and in the Findings of Fact and Conclusions of Law were not challenged in any way, either as containing facts that were not shown by the evidence or as omitting material facts shown by the evidence.

4. The greater part of the said Reporter's Transcript consists of evidence as to the acts of the defendants held by state courts to be illegal, and the damages resulting therefrom, all of which is covered by the Findings of Fact and Conclusions of Law and by the opinion of the Supreme Court of California and the evidence thereon was completely immaterial to any issue presented to this Court. A small portion of the said Reporter's Transcript containing the testimony of Ward W. Waddell, Jr. and consisting of twelve pages (pages 191 to 202) of the printed record, related to the proceedings before the National Labor

Relations Board, all of which, so far as material, was likewise completely covered by the Findings of Fact and Conclusions of Law and the opinion of the Supreme Court of California. A portion, consisting of twelve pages, (pages 310 to 321) of the printed record consists of the oral opinion of the trial judge and related matters, and a portion, consisting of fifteen printed pages (pages 67 to 81) consists of the opening statement of counsel and related matters, all of which is completely immaterial to any issue presented to this Court.

5. The oral testimony appearing in said transcript was not in fact referred to in the appellants' brief except that on page 4 and elsewhere in the said brief the said testimony was cited for the proposition that the petition to the National Labor Relations Board was maile on the same day that the proceeding in the court below was filed, a fact which is not material to the issues in this Court, and except that on page 5 and elsewhere in the said brief there is a reference to a point at which one of the attorneys for the plaintiffs testified as to a doubt whether an unfair labor practice charge was being committed, also a fact immaterial to the issues presented to this Court.

6. No other reference to any other portion of the Reporter's Transcript appears in the petitioners' brief except certain quotations from the opinion of the trial court, which was not necessary to the decision of the questions presented to this Court.

7. The Reporter's Transcript was not referred to by respondents in their brief except for certain background material relating to the identity of the parties, and as an additional citation for certain material for which other portions of the record were also cited (Respondents' Brief, pp. 4, 5, and 6).

8. No facts appearing from the said Reporter's Transcript and not appearing in the opinion of the Supreme Court of California or in the Findings of Fact and Conclusions of Law were relied

upon by any party or any amicus curiae as the basis for any argument of law presented to this Court, either in the briefs or in oral argument.

9. It is unjust and unnecessarily burdensome to require the respondents to pay for the printing of hundreds of pages of oral testimony and proceedings in the trial court when the issues presented were issues of law depending upon facts sufficiently appearing from the opinion of the Supreme Court of California and the pleadings, Findings of Fact and Conclusions of Law, and Judgment.

All of the said facts appear from the records of this Court.

Dated: May 17, 1957.

JAMES W. ARCHER
J. STERLING HUTCHESON
Counsel for Respondents.

WARD W. WADDELL, JR.
OF COUNSEL